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NIXON V. SHRINK MISSOURI GOVERNMENT PAC; FURTHER DISSENSION OVER THE FEDERAL ELECTION CAMPAIGN ACT

Gail Kijak Martens⁺

"There are two things that are important in politics. The first is money and I can't remember what the second one is."

—U.S. Senator Mark Hanna (OH), 1895.¹

"If you think this Congress, or any other, is going to set up a system where someone can run against them on equal terms at government expense, you're smoking something that you can't buy at the corner drugstore."

—U.S. Representative Richard Cheney (WY), 1983.²

Political campaigns and money have been intimately connected virtually since the creation of the American system of government.³ The financial needs of politicians were originally modest.⁴ As the nation grew in population and commercial

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1. Thomas A. Mann, *The U.S. Campaign Finance System Under Strain*, in *SETTING NATIONAL PRIORITIES: THE 2000 ELECTION AND BEYOND* 450 (Henry J. Aaron & Robert D. Reischauer eds., 1999). Mark Hanna, an Ohio political boss and campaign fundraiser for William McKinley in the late 1890s, solicited funds from corporations and banks and financed extensive political advertisements. See also Charles C. Euchner & John Anthony Maltese, *The Electoral Process*, in *SELECTING THE PRESIDENT: FROM 1789 TO 1996* at 38 (1997) (describing how Hanna used money to "influence possible delegates, and to pay for the kind of mass propaganda campaign that would change the face of national politics forever").

2. DAN CLAWSON ET AL., *MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE* 213 (1992) (agreeing with Representative Cheney that it is unrealistic to think Congress will pass reform legislation that will make fundraising more difficult).

3. See GEORGE THAYER, *WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT* 25 (1973) (describing efforts by George Washington to secure votes through the distribution of rum, wine, beer, and hard cider); Euchner & Maltese, *supra* note 1, at 37 (noting the creation and financing of a newspaper by Thomas Jefferson to oppose the policies of President Adams).

4. See THAYER, *supra* note 3, at 24 (noting that in 1789, the year George Washington became the first president of the United States, campaign financing

strength, however, the politicians' need for money also increased.⁵ Wealthy citizens usually supplied this money⁶ with an expectation of more from their elected officials than merely representation within the government.⁷ As the trend towards greater involvement by wealthy contributors developed, the political landscape of America began to be molded less by the statesman and more by the businessman.⁸ Calls for reform soon followed.⁹

Congress responded by enacting various laws designed to curb the influence of generous donors over the politicians they helped elect.¹⁰ Most of these laws were ineffectual,¹¹ yet the legislature routinely enact statutes¹² in a ceaseless effort to limit the

played no part in the election). In addition, most government positions in the newly formed nation were filled by appointment or through an open ballot at a town meeting directed and dominated by the local aristocracy. *Id.* at 25.

5. *See id.* at 27-29 (attributing the changes in election financing to the upsurge of the popular vote in elections). Campaign costs increased significantly during the presidency of Andrew Jackson due, in part, to the increase in eligible voters caused by the easing of voter qualifications. *See id.* at 28.

6. *See id.* at 30-31 (noting that wealthy businessmen recognized the growing need to influence government policies that affected their interests). During the mid-1800s, rising industrialists such as the DuPonts of Delaware contributed large amounts of money to political candidates to influence government policies. *Id.* at 31.

7. *Id.* at 30-31 (noting that "[wealthy industrialists] realized it was in their own interests to exert whatever influence they could over the legislative and bureaucratic processes of government. The easiest way to exert influence was with cash at campaign time.").

8. *See id.* at 38-43. The late 1800s was a period when large businesses with interests in oil, railroads, and banks financed the majority of political campaigns. *See id.* at 38. A business would finance a particular candidate in an effort to block a specific area of legislation detrimental to their interests. *See id.* at 39. The extent of this influence was extensive. *See id.* at 38-43.

9. *Id.* at 52 (describing demands by Progressive Reformers to decrease the influence of big business in the political process).

10. *Id.* at 54. Among early legislative efforts passed to counter influential campaign contributions was the Publicity Act of 1910, 36 Stat. 822, which required detailed accountings of all campaign receipts and expenditures to be filed with the Clerk of the House of Representatives. *Id.*

11. *See* Anthony Corrado, *Introduction to a History of Federal Campaign Finance Law*, in *CAMPAIGN FINANCE REFORM* 29 (Anthony Corrado et al. eds., 1997) (explaining that most campaign finance legislation proved ineffective due to poor enforcement and loopholes in the laws that allowed contributors to counter individual limitations by funneling donations through multiple candidate committees).

12. *See, e.g.,* Hatch Act of 1939, 5 U.S.C. §§ 1303, 3333, 7311, 7324, 7325 (1994); Federal Corrupt Practices Act of 1925, 18 U.S.C. § 602 (1994); Taft-

corrupting influence of money in elections.¹³

In 1971, Congress enacted an extensive and important campaign finance reform,¹⁴ entitled the Federal Election Campaign Act (FECA).¹⁵ Central among the various regulations instituted by FECA were those implementing strict limitations on campaign contributions¹⁶ and restricting expenditures by candidates.¹⁷ The Supreme Court, in the 1976 case of *Buckley v. Valeo*,¹⁸ considered the constitutionality of these newly created caps on expenditures and contributions.¹⁹ Opponents of FECA argued that the statutorily imposed limitations suppressed speech in direct violation of the First Amendment.²⁰ Although the Court agreed that both contributions and expenditures could be characterized as “speech,” it distinguished between the two²¹ and provided greater protection to expenditures.²² The

Hartley Act of 1947, 18 U.S.C. § 610 (1994).

13. See Corrado, *supra* note 11, at 27-34 (reviewing those laws enacted by Congress in the past century to reform campaign finance practices).

14. See Euchner & Maltese, *supra* note 1, at 39 (describing the Federal Election Campaign Act as “the most important piece of campaign finance legislation since the 1925 Federal Corrupt Practices Act”).

15. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, 47 U.S.C.).

16. 18 U.S.C. § 608(b)(1), (3) (1970 & Supp. IV 1975) (limiting individual contributions to a single candidate for federal office to \$1000 per year and restricting overall political contributions by an individual to \$25,000 per year). FECA also made illegal all contributions to a political candidate from national banks, corporations, and labor organizations. See 18 U.S.C. § 610 (1994).

17. 18 U.S.C. § 608(a) (1970 & Supp. IV 1975) (imposing limitations on expenditures by a candidate of his own personal funds or those of his immediate family for a federal election campaign); 18 U.S.C. § 608(c) (limiting overall expenditures by a candidate in a federal election campaign); 18 U.S.C. § 608(e) (restricting expenditures by individuals for a clearly defined candidate to \$1000 per year). Expenditures by national banks, corporations, and labor organizations to support candidates for federal office were also prohibited. See 18 U.S.C. § 610.

18. 424 U.S. 1 (1976) (per curiam).

19. *Id.* at 7 (reviewing the constitutionality of the statutory limitations enacted by the Federal Election Campaign Act and its 1974 amendments).

20. *Id.* at 11 (“In appellants’ view, limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money.”).

21. *Id.* at 44 (clarifying that expenditure limitations impose much greater restraints on speech than do contribution limits; the “Act’s expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations.”).

22. *Id.* at 44-45 (concluding that expenditure limitations impose greater restrictions on free speech than do contribution limitations and must, therefore,

Court reasoned that although both limitations restrained speech, those on contributions were "marginally restrictive,"²³ while those on expenditures were "substantially restrictive."²⁴ The Court invalidated the expenditure limitations as an unconstitutional restraint on free speech.²⁵ The Court, however, upheld the limitations on contributions²⁶ because such restraints were less intrusive than those on expenditures and supported Congress's compelling interest in preventing corruption or the appearance of corrupt practices.²⁷

In *Buckley*, the Court largely re-wrote critical sections of FECA,²⁸ dramatically altering the regulatory structure intended and created by Congress.²⁹ In the twenty-five years after

meet the "exacting scrutiny" afforded First Amendment matters to be found constitutional).

23. *Id.* at 20 ("[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."). See *infra* note 99 (describing alternative modes of political expression available to contributors).

24. *Id.* at 19 (concluding that limitations on expenditures are substantially restrictive because they directly restrict the quantity of a candidate's communication). See *infra* note 106 (noting the direct correlation between a candidate's expenditures and the quantity of speech available to him).

25. *Id.* at 39 (contending that although the expenditure limitations were content-neutral, they were unconstitutional because their effects directly reduced the amount of speech that could be communicated by both candidates and political parties).

26. See *id.* at 20-21 (explaining that the quantity of expression did not increase proportionately with higher levels of campaign contributions). The Court reasoned that the expression involved was the actual act of giving money to a candidate and as long as that act was not prohibited, limitations relating to amounts were not significantly restraining expression. *Id.*

27. See *id.* at 29 (finding that the "weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms").

28. Compare 18 U.S.C. § 608(e), with *Buckley*, 424 U.S. at 51 (comparing FECA's \$1000 limitation on individual expenditures for a candidate in a federal campaign to the Court's judgment that such a limitation is unconstitutional because it "fails to serve any substantial governmental interest . . . [and] heavily burdens core First Amendment Expression"). Compare 18 U.S.C. § 608(c), with *Buckley*, 424 U.S. at 55 (comparing FECA's overall limitation on expenditures by candidates to the Court's finding that "no governmental interest [] has been suggested [that] is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations") Compare 18 U.S.C. § 608(a), with *Buckley*, 424 U.S. at 52 (comparing statutory limitations on expenditures by candidates from personal or family resources to the Court's holding that such limits "clearly and directly interfere[] with constitutionally protected freedoms" and are thus unconstitutional).

29. See 120 Cong. Rec. 9980-81 (1974) (statement of Sen. Clark) (clarifying

Buckley, the Court continued to reformulate campaign finance regulations through its various decisions.³⁰ During this time members of the Court often questioned the appropriateness of the Court's substantial revision of campaign finance laws.³¹

Despite legislative and judicial efforts to guard against corruption, or the appearance of corruption, discontent with the current structure of campaign finance is vigorous and practically universal.³² Although FECA is still the primary regulatory scheme governing federal election campaigns,³³ its

Congress's belief that limitations on both contributions and expenditures were necessary to establish an effective campaign finance regulatory scheme).

30. See, e.g., *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996) (prohibiting application of a FECA provision disallowing independent expenditures by political parties); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (finding unconstitutional a FECA provision prohibiting direct expenditures of corporate funds for campaign purposes); *FEC v. National Conservative PAC*, 470 U.S. 480, 497 (1985) (overturning a provision limiting independent expenditures by political parties for a candidate receiving public campaign funds).

31. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting) (advising that the Court should defer to the judgments of Congress and state legislatures). According to then Justice Rehnquist, "[t]he judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court." *Id.*; see also *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (accepting Congress's judgment that FECA provisions prohibiting funds from corporations or labor unions to be used in federal elections). The Court explained that the provision reflected the legislature's judgment on the issue and it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *National Right to Work Comm.*, 459 U.S. at 210; see also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (explaining the Court's deference to legislative action when a legislature has significantly greater institutional expertise . . . the Court in practice defers to empirical legislative judgments").

32. See Thomas P. Wyman, *Campaign Finance Issues Concern Most Voters Poll Finds*, INDIANAPOLIS STAR, Oct. 14, 1998, at C04 (reporting that public discontent about campaign finance practices is high); David Morgan, *The Handshake That Went Nowhere*, SEATTLE TIMES, July 9, 1996, at B5 (describing the discontent of both voters and legislators over campaign finance reform); Ellen Nakashima, *Campaign Spending Difficult to Reform*, THE HARTFORD COURANT, Aug. 1, 1994, at A1 (discussing public discontent with campaign finance practices).

33. See *supra* notes 30–31 and accompanying text (reciting cases considering FECA regulations that control campaign finance practices). Various states have enacted statutes to regulate campaign finance practices relating to state elections. See, e.g., Public Campaign, *News & Analysis*, available at <http://www.publiccampaign.org/news/newsmain.html> (last visited Sept. 13, 2000) (describing a 1997 Vermont law limiting campaign contributions for statewide candidates); Public Campaign, *Press Advisory*, available at http://www.publiccampaign.org/press_releases/pr6_12_00.html (last visited

authority is continually challenged.³⁴ The Court's most recent examination of such a challenge is found in *Nixon v. Shrink Missouri Government PAC*,³⁵ which considered the validity of state contribution limitations³⁶ patterned after those upheld in *Buckley*.³⁷ In *Nixon*, a deeply divided court³⁸ ultimately followed *Buckley*'s precedent and upheld the Missouri limitations.³⁹

Although the majority opinion set forth a routine application of *stare decisis*,⁴⁰ the concurring and dissenting opinions looked beyond precedent and addressed the ineffectiveness of FECA and the Court's role in rendering that legislation unworkable.⁴¹ *Nixon* is significant because it clearly illustrates the intractable dissension that exists among the Justices regarding campaign finance reform.⁴² Although most Justices agreed that the current laws did not work,⁴³ unanimity could not be reached with regards to a solution.⁴⁴ This division closely reflects the

Sept. 13, 2000) (reporting on the Clean Election Act enacted by Maine, in 1996, which provided full public financing for political campaigns).

34. See, e.g., *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 241 (considering a challenge to the applicability of FECA regulations to expenditures of a non-profit corporation); *Nat'l Right to Work Comm.*, 459 U.S. at 197 (finding corporations and unions may only solicit funds for segregated political funds from members).

35. 528 U.S. 377 (2000).

36. *Id.* at 382 (referring to the Missouri statute that limited campaign contributions to a range between \$250 and \$1000 depending on the office sought).

37. *Id.* (describing limitations imposed on contributions for state elected office that, like the contribution limitation in *Buckley*, may not exceed \$1000).

38. *Id.* at 381, 398, 399, 405, 410. Five of the nine Justices filed or joined separate opinions in this case. *Id.*; see also *infra* note 43 and accompanying text.

39. *Id.* at 397-98 ("There is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case in support of the Missouri statute.").

40. See *id.* at 382 (holding "*Buckley* to be authority for comparable state regulation").

41. See *infra* notes 209-59 and accompanying text (explaining the concurring and dissenting opinions in *Nixon*).

42. See *infra* Part III.A (examining differences between the Justices).

43. See *Nixon*, 528 U.S. at 405. Justice Breyer, joined by Justice Ginsburg, considered the possibility that *Buckley* acts as an obstacle to "comprehensive solutions to the problems posed by campaign finance." *Id.* (Breyer, J., concurring). Justice Kennedy stated that "*Buckley* has not worked." *Id.* at 408 (Kennedy, J., dissenting). Justice Thomas, joined by Justice Scalia, concluded that contribution limitations when analyzed under strict scrutiny are unconstitutional. See *id.* at 410 (Thomas, J., dissenting).

44. See *id.* at 397 (arguing for no change in the status quo). Justice Kennedy suggested that limitations on expenditures be treated similarly to

sentiments of citizens⁴⁵ and politicians alike.⁴⁶ Nearly everyone agrees the system does not work, but still a consensus on a workable solution remains elusive.⁴⁷

Nixon also illustrates the Justices' varying opinions regarding the appropriate role for the Supreme Court in such a highly political matter.⁴⁸ The majority resisted appeals to overrule *Buckley* for policy reasons by maintaining that the Court may only decide cases and controversies before it.⁴⁹ Other Justices,

contribution limitations. See *id.* at 409 (Kennedy, J., dissenting). In contrast, Justice Thomas advocated the use of less inclusive means, such as bribery and disclosure laws, to regulate campaign financing. See *id.* at 428 (Thomas, J., dissenting).

45. See Public Campaign, *New National Survey Shows Robust Support for 'Clean Money,' Full Public Financing of Elections* (Apr. 3, 2000), available at http://www.publiccampaign.org/press_releases/pr4_3_00.html (last visited Sept. 13, 2000) (citing a national survey conducted by the Mellman Group in early 2000, two-thirds of those polled supported comprehensive campaign finance reform). Numerous systems have been adopted by the various states including a total ban in Texas on contributions to candidates by labor unions, regulatory industries and associations and a system in Maine that supports public financing of political campaigns. See Reporter's Reference Center on Campaign Finance Reform, *State and Local Overview*, available at <http://www.benton.org/neustadt/reporters/us.html> (last visited Sept. 13, 2000). Similar regulations were defeated by Californian voters. See Brookings Inst., *Recent Developments in Campaign Finance Regulation: Contribution & Spending Limits*, available at <http://www.brook.edu/gs/cf/contrib.htm> (last visited Oct. 3, 2000) (reporting the defeat of Proposition 25, which proposed a ban on corporate contributions and provided for public financing of political campaigns).

46. See Thomas E. Mann, *supra* note 1, at 462, 464, 468. Politicians also experienced difficulty in reaching consensus on a viable option to replace the current system of campaign finance. See *id.* at 462. For example, the McCain-Feingold bill would prohibit candidates from seeking funds not subject to FECA contribution limits, but a bill proposed by Rep. John Doolittle (CA) would repeal all current limitations on contributions. *Id.* at 464, 468.

47. See *supra* notes 41-43 and accompanying text (analyzing the varied opinions expressed by the Court). The Justices' philosophies and objectives clash under the complexities of the issue, as is clearly evidenced in *Nixon*. See *id.* Justice Thomas would overturn *Buckley* to protect contributions on much the same level as restrictions on expenditures. See *Nixon*, 528 U.S. at 412-13. Justice Kennedy, however, would overturn *Buckley* so limitations on expenditures could be imposed. See *id.* at 409.

48. See *infra* notes 204, 220, 244 (examining the varying opinions regarding the appropriate level of involvement for the Court in this matter).

49. See *Nixon*, 528 U.S. at 397. Responding to criticism that the majority avoided the "real issue" of campaign finance reform, Justice Souter argued for the majority that "we are supposed to decide *this case*." *Id.* (emphasis added). Justice Souter further noted that the petitioners "did not request that *Buckley* be overruled; the furthest reach of their arguments about the law was that subsequent decisions already on the books had enhanced the State's burden of

such as Justice Kennedy, called for the Court to acknowledge and address the larger issue involved, namely that the system as implemented under *Buckley* does not work.⁵⁰

This Note examines efforts to regulate campaign financing by focusing on the various arguments for and against limitations on contributions and expenditures. Part I of this Note reviews the long history of legislative efforts to guard against corrupt campaign financing practices and includes a detailed analysis of FECA. Part I also examines Court decisions subsequent to the enactment of FECA, primarily the *Buckley* decision, which have altered FECA's provisions and legislative intent. Part II of this Note considers recent political scandals, voter cynicism and the latest efforts to reform the system. Part II also analyzes how the majority, concurring and dissenting opinions in *Nixon* detail the different approaches to campaign finance reform advocated by the Justices. Part III of this Note evaluates the relative merits of the varying opinions and concludes that Justice Kennedy offers the most realistic assessment of the current situation and proposes the only solution bold enough to break the current impasse over campaign finance reform.

I. A LONG HISTORY OF FEDERAL CAMPAIGN FINANCE REFORM

A. Prior Legislative Efforts to Reform Campaign Finance

Efforts by Congress to increase the fairness of the American electoral process are not new.⁵¹ Public concerns regarding the escalating costs of campaigns and their financing by wealthy individuals and interest groups have existed for over one hundred years.⁵² Many of the campaign finance issues facing legislators and courts today were considered by Congress in past efforts to reform the electoral system.⁵³

justification beyond what *Buckley* required, a proposition we have rejected as mistaken." *Id.*

50. *Id.* at 408 (Kennedy, J., dissenting) (admonishing the majority for "failing to acknowledge or evaluate the whole operation of the system that we ourselves created in *Buckley*").

51. See *infra* notes 54, 58, 63, & 66 and accompanying text (describing various congressional laws enacted to reform campaign finance regulations).

52. See Mann, *supra* note 1, at 451 (describing how during the Progressive Era reform minded groups were concerned that large contributions were corrupting political candidates).

53. See *supra* note 51 and accompanying text (examining various efforts to reform campaign finance regulations).

An early legislative effort aimed at the perceived threat of corruption due to excessive contributions was the Tillman Act of 1907.⁵⁴ The Tillman Act prohibited contributions by banks and corporations to candidates in federal elections.⁵⁵ Congress hoped that its passage would satisfy the public demand to lessen the influence of wealthy participants in the electoral process.⁵⁶ The actual impact of the legislation was diminished, however, by a lack of enforcement.⁵⁷

The next major effort to reduce the influence of money in campaigns was the Federal Corrupt Practices Act of 1925,⁵⁸ which required the filing of detailed campaign finance statements⁵⁹ and imposed strict limitations upon expenditures by candidates.⁶⁰ The effectiveness of the legislation was limited however, by poor enforcement and the existence of numerous exceptions.⁶¹

Several years later, concerned that New Deal policies would increase the political power of President Franklin Roosevelt,⁶² Congress imposed further restrictions on financing practices with the enactment of the Hatch Act.⁶³ In addition to limiting

54. See Euchner & Maltese, *supra* note 1, at 38 (describing the enactment of the Tillman Act in 1907 as a response to allegations by muckraking journalists and political pressures).

55. Corrado, *supra* note 11, at 27-28 (noting that the ban is still in effect but is undermined by "soft money" loopholes).

56. *Id.* at 27 (explaining that Congress enacted the bill in response to public sentiment for reform and at the urging of its namesake, Benjamin Tillman).

57. Mann, *supra* note 1, at 451 (attributing the law's failure to "gaping loopholes," poor enforcement, and an uninformed public).

58. See Euchner & Maltese *supra* note 1 (describing this law as "the most important finance legislation until 1971").

59. Corrado, *supra* note 11, at 29 (saying that the Act required political committees, individuals, and candidates to provide, among other data, specific information regarding contributions and itemized accounts for both contributions and expenditures).

60. See *id.* (limiting spending in elections to \$25,000 in the Senate and to \$5000 in the House of Representatives).

61. See Thayer, *supra* note 3, at 62-63 (describing the law as "more show than substance"). A 1923 political commentator noted "that nowhere in the country has there been devised a legal method of effectively limiting the amount of money that may be spent in political fights. No law has been enacted through which the politicians cannot drive a four-horse team." *Id.*

62. See Corrado, *supra* note 11, at 30 (discussing speculations by Roosevelt's opponents that the newly expanded federal work force would support Roosevelt).

63. Pub. L. No. 753, 54 Stat. 767 (1940) (codified in scattered sections of 1, 5, 18 U.S.C.).

total contributions and expenditures by a political party over a one-year period,⁶⁴ the Hatch Act prohibited federal employees from soliciting funds for political campaigns.⁶⁵ Soon thereafter, Congress moved to counter the increasing political power of labor unions by enacting a provision within the Taft-Hartley Act of 1947,⁶⁶ which prohibited the use of union treasury funds for campaign contributions.⁶⁷

Despite Congress's attempts to address corruption, efforts at reform were largely unsuccessful due to both noncompliance and the lack of adequate enforcement.⁶⁸ By the 1970s, substantial increases in both the dollar amounts expended by candidates and the voters' access to political information led to the public's desire for a new solution.⁶⁹

B. Federal Election Campaign Act: Comprehensive Legislation for a System Gone Awry

FECA,⁷⁰ enacted in 1972 and substantially revised in 1974,⁷¹ is a comprehensive statute designed to significantly limit the amount of money associated with federal elections.⁷² The American public's substantial distrust of politics and government contributed to the enactment of FECA.⁷³ Prior to FECA, the nature of political campaigns changed significantly

64. Corrado, *supra* note 11, at 30 (reciting the \$3 million limit on the amount a political party could receive or spend within a year).

65. *Id.* (noting that this restriction was an extension of the prohibition originally established in the Pendleton Civil Service Act of 1883).

66. 18 U.S.C. § 610.

67. See Corrado, *supra* note 11 (observing that the ban on labor union funds has remained part of campaign regulation up to the present).

68. See Mann, *supra* note 1, at 451 (considering the problems contributing to the failure of campaign finance regulations).

69. See Euchner & Maltese, *supra* note 1, at 39 (noting that both political spending and the average American's exposure to television advertising rose during the period from 1952 to 1968).

70. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, 47 U.S.C.).

71. Pub. L. No. 93-443, 88 Stat. 1263 (1974). The Watergate scandal of 1972 moved Congress to amend FECA in 1974. See Mann, *supra* note 1, at 451.

72. See Mann, *supra* note 1, at 451-52 (noting that FECA set limits on individual contributions, the amount of personal wealth a candidate could expend, and imposing limits on total campaign expenditures).

73. Euchner & Maltese, *supra* note 1, at 41 (noting that the 1974 amendments to FECA were enacted during a period of public discontent over the Watergate scandal).

with the advent and proliferation of the television.⁷⁴ Television made it possible for a candidate to reach far more voters with a thirty-second television advertisement than through traditional outlets.⁷⁵ The desire to buy effective but expensive air-time led to increased campaign costs.⁷⁶ Between 1964 and 1968, campaign spending increased from \$200 to \$300 million.⁷⁷ With the enactment of FECA, Congress hoped to decrease the influence of money in elections⁷⁸ and restore Americans' confidence in government, which was seriously shaken by the Watergate scandal in 1974-1975.⁷⁹

As originally enacted, FECA instituted a comprehensive regulatory scheme to administer matters of federal campaign finance.⁸⁰ Among its many provisions, the statute required full

74. See Mann, *supra* note 1, at 461; Corrado, *supra* note 11, at 31. An excellent example of the visual impact television afforded a political candidate was the Nixon-Kennedy debate of 1960. See GIL TROY, *SEE HOW THEY RAN: THE CHANGING ROLE OF THE PRESIDENTIAL CANDIDATE* 210-11 (1996). Troy describes this landmark debate as follows: "Political folklore tells how the tanned, athletic Kennedy surmounted the stature gap and won the election'. . . Nixon was 'half slouched, his 'Lazy Shave' powder faintly streaked with sweat, his eyes exaggerated hollows of blackness, his jaws, jowls, and face drooping with strain.'" *Id.*

75. See Troy, *supra* note 74, at 198 (explaining that during the 1952 presidential campaign, candidate Adlai Stevenson was able to reach twice the audience he had with radio by addressing the public on television).

76. See Corrado, *supra* note 11, at 31 (describing television as "an essential means of political communication").

77. Jeffrey M. Berry & Jerry Goldman, *Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971*, 10 HARV. J. ON LEGIS. 331, 334 (1973) (noting that this dramatic increase in spending brought about serious consideration by Congress of the growing problem of campaign finance).

78. Euchner & Maltese, *supra* note 1, at 39 (describing Congress's intent to "reduce what was seen as the insidious influences of private money").

79. See TROY, *supra* note 74, at 223 (stating that the Nixon scandal, in addition to other factors such as Vice-President Spiro Agnew's indictment and the legacy of sixties counter-culture, lead Americans to "yearn[] for an electoral overhaul").

80. See Mann, *supra* note 1, at 451-52 (noting that FECA continued prohibitions on corporate and union funds, limited the use of a candidate's family wealth, limited contributions by individuals and political parties during a campaign, imposed caps on total spending by a candidate and also independent expenditures made on behalf of a candidacy, strengthened disclosure laws and enforcement provisions, established the Federal Election Commission and instituted the Presidential Election Campaign Fund to provide public funding for presidential elections). The comprehensive nature of the law was also recognized by the California appellate court considering *Buckley*, "[t]his case presents for review the latest, and by far the most comprehensive, reform legislation passed by Congress concerning the election of the President, Vice-

disclosure of campaign contributions and expenditures,⁸¹ provided for public financing of presidential campaigns,⁸² and established the Federal Election Commission (FEC) to oversee implementation of the law.⁸³ Although all of these provisions were intended to promote fairer, less costly elections,⁸⁴ the regulations with the greatest and most immediate impact were those limiting campaign contributions and expenditures.⁸⁵ Specifically, FECA limited political contributions "by an individual or a group to \$1,000 and by a political committee to \$5,000 to any single candidate per election, with an overall annual limitation of \$25,000"⁸⁶ and limited expenditures "by individuals or groups . . . to \$1,000 per candidate."⁸⁷ In addition, FECA restricted a candidate's ability to personally finance his own campaign⁸⁸ and created a cap on permissible expenditures by candidates during primary and general elections.⁸⁹

President and members of Congress." *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975).

81. See 2 U.S.C. § 434(a) (1975) (requiring in part, each candidate or committee supporting a candidate to "file with the Commission reports of receipts and expenditures on forms to be prescribed or approved").

82. 26 U.S.C. §§ 9001-9012, 9031-9042 (1975) (creating the Presidential Election Campaign Fund, providing public matching funds for qualified candidates, financed through revenue donated on individual tax returns in the amount of \$1 per individual filing).

83. 2 U.S.C. § 437(c) (establishing the Federal Election Commission, the organization primarily responsible for enforcement of all FECA provisions).

84. See *Orloski v. FEC*, 795 F.2d 156, 163 (D.C. Cir. 1986) (noting Congress's purposes for the FECA were "to limit spending in federal election campaigns and to eliminate the actual or perceived pernicious influence over candidates for elective office that wealthy individuals or corporations could achieve by financing the 'political warchests' of those candidates").

85. See 18 U.S.C. § 608(b)(1) (limiting contributions by individuals to federal candidates to \$1000); 18 U.S.C. § 608(b)(3) (restricting aggregate contributions by an individual to \$25,000 per year); 18 U.S.C. § 608(c) (imposing expenditure limitations on federal candidates).

86. 18 U.S.C. § 608(b)(2) (limiting contributions by political committees to federal candidates to \$5000 per election).

87. 18 U.S.C. § 608(e) (restricting expenditures made by an individual or group "to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000").

88. 18 U.S.C. § 608(a) (enacting limitations on the amount of personal and family funds a candidate could expend in a campaign). The relative limits varied depending on the office sought. *Id.*

89. See 18 U.S.C. § 608(c) (imposing expenditure limitations on candidates that varied according to the office sought).

C. The Court Changes the Rules: Buckley v. Valeo and Its Progeny—Varying Levels of Constitutional Protection For Contributions and Expenditures

In 1976, the Supreme Court considered a major challenge to the constitutional validity of FECA in *Buckley v. Valeo*.⁹⁰ In *Buckley*, several candidates and political organizations challenged FECA claiming that the contribution and expenditure limitations violated the First Amendment protections of free speech and association.⁹¹ The Court began its analysis by noting that political contributions and expenditures both qualified as political speech governed by the First Amendment.⁹² The Court concluded that although both acts were forms of political speech, they were not entitled to the same degree of protection.⁹³ According to the Court, limitations on expenditures represented a substantial restraint on speech because it directly reduced the quantity of expression afforded.⁹⁴ In contrast, the contribution limitations were only a “marginal restriction” upon the contributor’s right of expression and were thus more amenable to reasonable restraints.⁹⁵

90. 424 U.S. 1 (1976) (per curiam) (challenging four major provisions of the law namely, limitations on contributions and expenditures, disclosure requirements, establishment of the Presidential Campaign Fund and those provisions creating the Federal Election Commission).

91. *Id.* at 11 (arguing that methods of modern communication demand the expenditure of money, thus limitations restrict speech).

92. *Id.* at 14 (reflecting upon the importance of open political discussion and debate to the vitality of American government). The Court noted that political debate is essential in a system that is dependent upon the awareness and judgment of its citizenry. *Id.* The Court acknowledged the national commitment to the “principle that debate on public issues should be uninhibited, robust and wide-open.” *Id.*

93. *Id.* at 23.

94. *See id.* at 19 (addressing the direct correlation between money spent and communication conveyed). The Court conceded that virtually all political communication required some outlay of money, such as printing expenses for handbills and rentals fees for speech halls. *See id.* It determined that an expenditure restriction “necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” *Id.*

95. *See id.* at 20-21 (concluding that contribution limitations were marginally restrictive because they did not directly restrict the contributor’s ability to communicate his support for a candidate). The Court reasoned that a contribution, of either \$10 or \$10,000, acted as a general expression of support. *See id.* As such, a cap on the amount an individual or group could contribute did not prevent that symbolic act or support. *See id.* at 21. The Court further concluded that limitations would not reduce political activity, but would instead

Because FECA imposed restrictions on protected speech, the Court applied what it identified as "exacting scrutiny required by the First Amendment."⁹⁶ The Court ultimately upheld the contribution limitations, stating that the government's interest in reforming the electoral financing system was "sufficiently important,"⁹⁷ and that the contribution limitations were "closely drawn" to meet those interests without silencing free speech.⁹⁸ Consequently, such restrictions only involved a marginal restraint on political communication.⁹⁹ The Court explained that "the quantity of communication by the contributor does not

require candidates to seek financial assistance from a broader base of contributors and would compel individuals to fund their own direct political expression. *See id.* at 21-22.

96. *Id.* at 16. The Court never clearly defined what was demanded by the "exacting scrutiny required by the First Amendment," and it subsequently altered its reference to this scrutiny throughout the opinion. *See id.* The Court later referred to the standard imposed as the "closest scrutiny" under which a state must demonstrate a sufficiently important interest and closely drawn means. *Id.* at 25. The Court again altered its terms when it described the judicial scrutiny as a "rigorous standard of review" which requires "weighty interest[s] . . . sufficient to justify the limited effect upon First Amendment freedoms . . ." *Id.* at 29. Justice Thomas labels the scrutiny applied as "the sui generis *Buckley's* standard of scrutiny," a deviation from the traditional test employed in free speech cases. *See id.* at 923. The vagueness regarding the level of scrutiny employed by the Court in its decision has brought much criticism and is often the foundation of arguments calling for the overruling of *Buckley*. *See generally* Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996). Justice Thomas, dissenting in *Colorado Republican*, maintained that the analytical framework utilized in *Buckley* was deeply flawed. *Id.* at 640 (Thomas, J., dissenting).

97. *Buckley*, 424 U.S. at 29-30. The government put forth two additional justifications for the limitations. *See id.* First, to limit the relative voice of wealthy individuals and groups in order to equalize the voice of all citizens and also to retard skyrocketing campaign costs. *Id.* The Court rejected both of these interests. *Id.* It found that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ." *Id.* at 48-49. The Court also rejected the interest in slowing campaign costs as a basis for such limitations. *See id.* at 57.

98. *Id.* at 25 (maintaining that the limitations were a valid response to possible corrupting influences of large contributions). The Court held further that the amount of the limitation cap was a legislative, not judicial, matter. *See id.* The Court agreed with the Court of Appeals that a court "has no scalpel to probe whether . . . a \$2,000 ceiling might not serve as well as \$1,000." *Id.* at 30. The Court considered the expressive speech to be the act of contributing rather than the actual words later spoken by the candidate. *Id.* at 20.

99. *See id.* at 20-21 (finding contribution limitations to be marginally restrictive because the contributor was able to express himself politically through other means, such as discussions with others regarding issues and the candidates).

increase perceptibly with the size of his contribution.”¹⁰⁰ Because the statute did not prohibit all contributions, but merely limited the amounts, the Court found FECA’s marginal restraint of expression acceptable.¹⁰¹

In contrast to contribution limitations, the Court found the restrictions on expenditures to be unconstitutional.¹⁰² The Court characterized these limitations as “direct and substantial restraints”¹⁰³ on speech and, therefore, unconstitutional.¹⁰⁴ Unlike contributions, in which the quantity of expression does not increase in proportion to the amount contributed,¹⁰⁵ the Court reasoned that limitations on expenditures directly impair the quantity of political speech.¹⁰⁶

Despite its ruling, the Court was far from unified on the holdings.¹⁰⁷ Five justices,¹⁰⁸ including Chief Justice Burger, filed separate opinions with each member joining in part and dissenting in part. The opinions covered the spectrum of

100. *Id.* at 21. Unlike expenditures where less money necessarily equals less communication, a restriction on the amount an individual may contribute does not necessarily limit the quality of a contributor’s communication. *See id.* at 19-21.

101. *Id.* at 20-22 (noting the limitations restricted actual contributions but not the potential for political activity by a contributor).

102. *Id.* at 58-59 (concluding that expenditure limitations “place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate”).

103. *Id.*

104. *Id.* at 58. The Court also indicated that limitations, although content neutral with regards to the communication expressed, were still unconstitutional due to their stifling effect on core political expression. *See id.* at 39.

105. *See id.* at 21 (explaining that “[t]he quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing”).

106. *See id.* at 19 (finding that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached”).

107. *See infra* notes 109-112 and accompanying text (examining the Justices’ varied opinions regarding the applicability of limitations on contributions and expenditures).

108. *Buckley*, 424 U.S. at 235, 257, 286, 290. Chief Justice Burger, Justice White, Justice Marshall, Justice Rehnquist, and Justice Blackmun all filed separate opinions. *Id.*

debate. Justices White¹⁰⁹ and Marshall asserted the need for expenditure limits.¹¹⁰ Chief Justice Burger argued against contribution limits.¹¹¹ Justice Blackmun, meanwhile, maintained that it was impossible to make a proper distinction between a contribution and an expenditure.¹¹² Though most could agree that various provisions within FECA were impermissible and in need of revision,¹¹³ a consensus on what would represent a valid replacement proved elusive.¹¹⁴ Despite the lack of consensus, *Buckley* significantly altered the structure of campaign finance regulation from that originally intended by Congress.¹¹⁵

109. See *id.* at 264-65 (White, J., concurring in part and dissenting in part) (maintaining expenditure limitations are a necessary reinforcement of contribution caps and will help to dispel the public's impression "that federal elections are purely and simply a function of money").

110. See *id.* at 288 (Marshall, J., concurring in part and dissenting in part) (arguing specifically for limitations on the amounts a candidate may spend from personal funds). Justice Marshall contended that such a limitation is necessary to lessen the financial advantage a wealthy candidate would hold over a less affluent opponent. See *id.*

111. *Id.* at 235 (finding the infringement upon First Amendment rights by limits on campaign contributions to be equal to those imposed by expenditure restrictions). Additionally, Justice Burger argues that "[b]y dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts." *Id.*

112. *Id.* at 290 (Blackmun, J., concurring in part and dissenting in part) (attributing his dissent in various sections of the Court's ruling to his doubts that the Court can make a principled distinction between contribution and expenditure limitations).

113. See *id.* at 241 (Burger, C.J., concurring in part and dissenting in part) (stating his disapproval of contribution limitations, public financing of presidential elections and the disclosure provisions). Justice Blackmun voiced his opposition to expenditure limitations based on his belief that there is no real distinction between contributions and expenditures. See *id.* (Blackmun, J., concurring in part and dissenting in part).

114. See *supra* note 107 and accompanying text (reciting various opinions put forth by the Justices).

115. See *supra* note 80 and accompanying text (describing the original structure of FECA). The *Buckley* decision altered FECA's structure by prohibiting limitations on expenditures. See *Buckley*, 424 U.S. at 52. In addition, the Court found that the composition of the Federal Election Commission violated the Appointments Clause and was thus unconstitutional. *Id.* at 143. However, the Court upheld the constitutionality of the Presidential Election Campaign Fund, as well as the disclosure provisions of the law. *Id.* at 143. Chief Justice Burger feared the Court had altered FECA too extensively, stating that, "Congress intended to regulate all aspects of federal campaign finances, but what remains after today's holding leaves no more than a shadow of what Congress intended. I question whether the residue leaves a workable program." *Id.* at 236.

Four years after *Buckley*, the Court again considered the constitutionality of FECA in *California Medical Association v. FEC*.¹¹⁶ The decision focused on the validity of a FECA provision that prohibited individuals from contributing more than \$5000 to a multi-candidate political committee.¹¹⁷ The California Medical Association (CMA) maintained that the restriction was not merely a limitation on contributions but, in fact, an unconstitutional expenditure limitation because it prevented the medical association from expressing its views through its political action committee (PAC).¹¹⁸ In the CMA's view, the PAC was not an independent organization but rather an integral and invaluable arm of the medical association.¹¹⁹ The CMA further argued that even if a donation to its PAC was properly classified as a contribution, FECA was still unconstitutional because the donation was internal and not directed outside the organization.¹²⁰ The CMA reasoned that the risk of "actual or apparent corruption of the political process" did not exist because the association was giving money to its own PAC, not to a candidate for public office.¹²¹ Thus the substantial interest that justified the limitation in *Buckley*¹²² was not present in this case.¹²³

116. 453 U.S. 182 (1981) (considering a constitutional challenge to FECA provisions that limit contributions by associations to those made by political action committees).

117. *Id.* at 183 (referring to 2 U.S.C. § 441a(a)(1)(C) (1976)). In *California Medical*, the plaintiff was a physician's association that wished to contribute funds to its political action committee, called the "California Medical Political Action Committee (CALPAC)." *Id.* at 185.

118. *See id.* at 195 (challenging the classification of funds as contributions rather than expenditures, arguing that CALPAC was in actuality disseminating CMA's political speech and thus money transferred to that organization should be classified an expenditure).

119. *See id.* (maintaining that CMA directly conveyed its political speech through CALPAC). Appellant argued that "this is the manner in which CMA has chosen to engage in political speech." *Id.* at 196.

120. *See id.* (noting that funds were not being directed to an entity wholly independent of CMA, but instead to the political action committee formed to pursue its political interests).

121. *See id.* at 196-97 (maintaining that the justification for limitations, preventing corruption or the appearance thereof within the electoral process, does not exist in a case such as this, where an organization is funding its own speech and not that of an independent candidate).

122. *See Buckley*, 424 U.S. at 25-26 (noting that the only justification sufficient to impose restrictions upon contributions is the threat or appearance of corruption).

123. *See California Medical*, 453 U.S. at 195 (arguing that corruption or the

The Court ultimately rejected the CMA's characterization of PAC donations as expenditures rather than contributions.¹²⁴ The Court labeled the expression "speech by proxy"¹²⁵ and concluded that under *Buckley*, contribution limitations imposed on this type of communication were valid.¹²⁶ As in *Buckley*, the restrictions were marginal in scope and appropriate to further the government's substantial interest.¹²⁷

Six months after *California Medical*, the Court considered the constitutionality of contribution limitations imposed by a municipal government in *Citizens Against Rent Control v. City of Berkeley*.¹²⁸ In *Berkeley*, the issue was whether a city ordinance that restricted to \$250 individual contributions to a "committee formed to support or oppose ballot measures"¹²⁹ was

appearance of corruption did not exist in this case because both parties, CMA and CALPAC, were the same entity).

124. *Id.* at 195 (concluding the disbursements CMA made to CALPAC could not be characterized as independent expenditures and thus were not eligible for protection as such). The Court held that nothing "limits the amount CMA or any of its members may independently expend in order to advocate political views; rather, the statute restrains only the amount that CMA may contribute." *Id.*

125. *Id.* at 196. "Speech by proxy" refers to a situation when an individual, rather than speaking directly on an issue, expresses his views through the communications of another. *See id.* at 197.

126. *Id.* at 196-97. The Court determined that "speech by proxy" was "not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." *Id.* at 196.

127. *See id.* at 198-99 (reasoning that limitations upon contributions made to multi-candidate committees such as CMA, are necessary to prevent individuals and groups from evading other statutory caps on contributions). The Court contended that without the limitation imposed on CMA, contributors would circumvent the \$1000 cap on individual contributions to candidates by donating higher amounts to "multicandidate" PACs. *See id.* at 198.

128. 454 U.S. 290 (1981). Both the state Superior Court and the California Court of Appeals found a city ordinance unconstitutional, which restricted to \$250 the amount an individual could contribute to "committee[s] formed to support or oppose ballot measures." *Id.* at 291-93. The California Supreme Court reversed these lower holdings, however, concluding that the infringement of First Amendment rights caused by the ordinance was outweighed by the compelling governmental interests in guarding against corruption or the appearance thereof. *See Citizens Against Rent Control v. City of Berkeley*, 167 Cal. Rptr. 84 (Cal. 1980).

129. *City of Berkeley*, 454 U.S. at 291. The ordinance provided that "[n]o person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars (\$250)." *Id.* at 292.

constitutional. Employing an “exacting judicial review,”¹³⁰ the Court weighed the contributor’s constitutional right to free speech against the government’s compelling interest in enacting the ordinance.¹³¹ Unlike previous decisions,¹³² the *Berkeley* Court concluded that the city’s interest was “insubstantial” and unable to warrant restraints on speech.¹³³ The Court reasoned that contributions to support or oppose an initiative were much less likely to lead to corruption than were contributions to an individual candidate.¹³⁴

In *Colorado Republican Federal Campaign Committee v. FEC*,¹³⁵ the Court considered the constitutionality of a specific FECA provision relating to expenditures by political parties in general elections.¹³⁶ Under the Party Expenditure Provision, political parties were exempted from the \$5000 limit on contributions to political candidates.¹³⁷ The parties were governed, however, by a substitute limitation that varied by state and was determined

130. *Id.* at 294.

131. *See id.* at 295-98 (referring to a contributor’s right to finance a message he supports and the city’s interest in preventing corruption with the ballot measure process).

132. *See supra* notes 97 & 122 and accompanying text (noting the acceptance in *Buckley* of the state’s interest in preventing corruption or its appearance within the electoral system).

133. *City of Berkeley*, 454 U.S. at 298.

134. *See id.* at 296-98 (finding that “[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue” (citations omitted)).

135. 518 U.S. 604 (1996).

136. *Id.* at 608 (discussing the “Party Expenditure Provision,” an exception to the general limitation on contributions and expenditures by political parties). Expenditures by a party or individual, spent in coordination with a political candidate were considered “indirect contributions” and subject to FECA contribution limitations. *Id.* at 611. Coordinated expenditures were defined as “expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.” 2 U.S.C. § 441a(a)(7)(B)(i) (1994). Some attribute the high price tag and scandals of the 1996 presidential election to the Court’s decision that year. *See* Bruce Buchanan, *The Presidency and the Nominating Process*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM*, 251, 255-56 (Michael Nelson ed., 5th ed. 1998) (speculating that the decision in *Colorado Republican Campaign Committee v. FEC* “opened the money floodgates even wider, permitting parties to solicit donations directly from rich individuals and corporations”).

137. *See id.* at 610-11 (quoting 2 U.S.C. § 441 (d)(1) which states: “[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, . . . political party [committees] . . . may make expenditures in connection with the general election campaign of candidates for Federal office . . .”).

based on the voting age population of the state.¹³⁸ In *Colorado Republican*, the Colorado Republican Party challenged the Party Expenditure Provision as unconstitutional.¹³⁹ A divided Court held that the FECA regulation did indeed violate the Constitution as applied.¹⁴⁰ Although the provision regulated expenditures spent in coordination with a political candidate, the Court determined that the provision was not applicable to expenditures that were independent in nature.¹⁴¹ The Court concluded that political parties were entitled to the same protection afforded individuals or private groups making independent expenditures.¹⁴²

II. CAMPAIGN FINANCE REGULATION TODAY

A. Corruption, Cynicism, and the McCain-Feingold Bill: The

138. See *id.* at 611 (calculating the substitute expenditure limitation in a senatorial campaign as "the greater of \$20,000 or '2 cents multiplied by the voting age population of the State").

139. See *id.* at 612.

140. *Id.* at 613. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, filed an opinion concurring in the judgment and dissenting in part. *Id.* at 626. Although he supported the Court's decision, Justice Kennedy argued that both coordinated and independent expenditures should receive First Amendment protection. See *id.* The candidate, he reasoned, is just a communicator of the party's message and it is, therefore, unrealistic to view their expenditures separately. *Id.* at 629-30. Consequently, limitations barring candidate expenditures should likewise bar those made by political parties. See *id.* at 630. Justice Thomas, also joined by Chief Justice Rehnquist and Justice Scalia, wrote separately, concurring in the judgment, but dissenting in part. *Id.* at 631. Justice Thomas argued for the abandonment of the framework established in *Buckley*, reasoning that under strict scrutiny, all expenditure and contribution limitations are unconstitutional. See *id.* at 640-41. According to Justice Thomas, "[a] contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance." *Id.* at 638. Lastly, Justice Stevens, joined by Justice Ginsburg, offered a dissenting opinion. *Id.* at 648. He contended that all expenditures by political parties, coordinated or independent, are, in fact, contributions and as such should be subject to contribution limitations. *Id.* Justice Stevens relied on the state's interest in preventing corruption and the circumvention of other contribution limitations to support his opinion. See *id.* at 648-49. He further embraced an interest that *Buckley* lacked, namely, the "leveling [of] the electoral playing field by constraining the cost of federal campaigns." *Id.* at 649.

141. See *id.* at 615. The Court grounds its reasoning in the varying levels of constitutional protection afforded contributions and expenditures first set out in *Buckley*. See *id.* at 614-15.

142. *Id.* at 618 (questioning "how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties").

Current State of Campaign Finance Regulation

The Supreme Court has consistently held that First Amendment rights may only be infringed to further a compelling state interest.¹⁴³ To date the only interest found to be compelling with regard to campaign finance is the prevention of corruption or the appearance of corruption in the electoral process.¹⁴⁴ Limitations on campaign contributions are repeatedly upheld in the name of this compelling interest.¹⁴⁵ Despite these efforts, corruption within the electoral process continues to flourish, with numerous scandals reported over the past two decades.¹⁴⁶

One such scandal, uncovered during the late 1980s, involved five U.S. Senators charged with accepting prohibited contributions in exchange for political considerations.¹⁴⁷ Over on million dollars in contributions were made to various Senators by Charles Keating, manager of the failed Lincoln Savings and

143. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (requiring all government imposed racial classifications to be reviewed under strict scrutiny which requires a compelling state interest to infringe upon a constitutional right); *Department of Human Res. v. Smith*, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring) (requiring the state to demonstrate a compelling government interest to infringe upon claimant's use of peyote for alleged religious practices).

144. See *Buckley v. Valeo*, 424 U.S. 1, 25-29 (1976) (per curiam) (relying on the government's weighty interest in preventing corruption and the appearance of corruption attributable to large contributions); see also *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985) (finding the only compelling interest to infringe upon a First Amendment right is the prevention of corruption or its appearance); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-97 (1981) (identifying the only compelling interest justifying infringement upon First Amendment rights as that relating to "the perception of undue influence of large contributors to a candidate").

145. See *Buckley*, 424 U.S. at 143 (finding FECA limitations on contributions to be constitutionally valid); *California Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981) (upholding restrictions limiting contributions to PACs).

146. See CHARLES LEWIS, *THE BUYING OF CONGRESS: HOW SPECIAL INTERESTS HAVE STOLEN YOUR RIGHT TO LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS* 16-17 (1998) (considering various political scandals involving contributions and improprieties by various politicians). Two instances of corruption were revealed within days of each other in 1989. See *id.* House Majority Whip Tony Coelho resigned amid revelations of an improper bond arrangement extended to him by a savings and loan operator. *Id.* Several days later, Speaker of the House Jim Wright resigned following disclosure of his inappropriate financial transactions with a lobby group. *Id.*

147. See *id.* at 17 (noting that Democratic Senators Alan Cranston (CA), Dennis DeConcini (AZ), John Glenn (OH), Donald Riegle Jr. (MI), and Republican Senator John McCain (AZ) were charged with improper conduct).

Loan Association.¹⁴⁸ The Senate ultimately found these donations improper.¹⁴⁹ When asked by reporters whether he thought his contributions improperly influenced the five senators, Keating responded, "I certainly hope so."¹⁵⁰ Alan Cranston of California, one of the Senators reprimanded, defended his conduct by blaming campaign finance regulations—"[t]he present system makes it virtually impossible . . . to avoid what some will assert is a conflict of interest . . . how many of you [Senators] . . . could rise and declare you have never, ever helped—or agreed to help—a contributor close in time to the solicitation or receipt of a contribution?"¹⁵¹ He implied it was the system, not him, that was corrupt. Each of the five Senators was subsequently reprimanded for unethical conduct.¹⁵²

Later in the mid-1990s, then Speaker of the House Newt Gingrich was accused of improprieties relating to his involvement with a conservative political group, GOPAC.¹⁵³ Although GOPAC was originally touted as an educational organization, its purpose was in fact to promote the conservative political agenda of its members.¹⁵⁴ In the process of soliciting large contributions for this organization, Gingrich violated various campaign regulations.¹⁵⁵ For his actions, the Speaker was fined \$300,000.¹⁵⁶

Larger than both the Keating Five and Gingrich scandals are those associated with Bill Clinton's 1996 re-election campaign and his departing presidential pardons.¹⁵⁷ Numerous charges of

148. See *id.* (disclosing the total amount of contributions given to be approximately \$1.4 million, eighty percent of which constituted "soft money").

149. See *id.*

150. *Id.* Charles Keating was imprisoned for his involvement in defrauding customers of his failed Savings and Loan. *Id.*

151. *Id.*

152. See *id.* (noting that Senator Cranston received the harshest reprimand).

153. See JEFFREY H. BIRNBAUM, *THE MONEY MEN: THE REAL STORY OF FUND-RAISING'S INFLUENCE ON POLITICAL POWER IN AMERICA* 46-47 (2000) (noting Newt Gingrich's control of the organization and its transformation from an educational association to a more politically active entity).

154. *Id.* (describing GOPAC's transformation from an organization designed to groom future Republican candidates to a "money machine").

155. See *id.* (describing how Congressman Gingrich subverted regulations by maintaining GOPAC was an educational organization when it, in fact, was a partisan political machine).

156. LEWIS, *supra* note 146, at 19.

157. See BIRNBAUM, *supra* note 153, at 47 (contending that "[n]o one . . .

impropriety were brought against both the President and Vice President with regards to their fundraising practices.¹⁵⁸ The charges against the President included “renting out” the Lincoln Bedroom to large contributors, soliciting donations from foreign nationals, having “coffees” with large contributors, and diverting millions of dollars from the Democratic National Committee (DNC) to the President’s election campaign.¹⁵⁹ President Clinton was also accused of coordinating directly with the DNC in the financing and production of his presidential campaign advertisements,¹⁶⁰ in direct violation of the law as determined in *Colorado Republican*.¹⁶¹

Equally scandalous was the presidential pardon of fugitive financier Marc Rich.¹⁶² Rich, who fled the country and avoided prosecution in the U.S. courts for seventeen years,¹⁶³ was

went as far as Bill Clinton” when it came to violating campaign finance regulations). See also Robert L. Jackson & Richard A. Serrano, *U.S. Atty. Launches Inquiry on Rich Case Law: Prosecutor in New York Reportedly Decides to Investigate if Clinton's Pardon of Broker Was the Result of Illegal Merits*, L.A. TIMES, Feb. 15, 2001, at A1 (describing the “176 pardons and commutations,” which included that for fugitive financier Marc Rich).

158. LEWIS, *supra* note 146, at 20 (listing numerous campaign finance violations attributed to President Clinton’s fundraising efforts and referring to him as a “‘flawed vessel’ on the subject of integrity in government and keeping an arm’s length from special interests”).

159. *Id.* (analyzing campaign financing practices associated with what the author refers to as “the most expensive and possibly the most corrupt [election] in U.S. history”).

160. See David A. Pepper, Article, *Recasting the Issue Ad: The Failure of the Court's Issue Advocacy Standards*, 100 W. VA. L. REV. 141, 162 (1997) (examining the President’s participation in DNC presidential campaign advertisements). President Clinton is described as the “day-to-day operational director of our [DNC] TV ad campaign,” and it is reported that he held direct meetings with “top DNC officials discussing the strategy and content of the ads”). *Id.*

161. See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617 (1996) (finding the “constitutionally significant fact” in determining whether funds are independent in nature and free of limitations or subject to regulation as contributions is whether the candidate has coordinated efforts with the organization). According to *Colorado Republican*, if the parties have worked in coordination then the funds are considered contributions and are subject to FECA limitations. See *id.*

162. See Mike Dorning, *House Panel Grills Clinton Official Pardon for Financier Skipped Review by Justice Prosecutors*, CHI. TRIB., Feb. 9, 2001, at A3 (reporting the pardon of Marc Rich, who was listed on the FBI’s Ten Most Wanted List for “the largest tax evasion scheme in U.S. history” and for “trading with Iran during the hostage crisis in violation of U.S. sanctions”).

163. See *U.S. Atty.*, *supra* note 157 (noting that Rich lived as a fugitive in Switzerland to “avoid[] prosecution in New York”).

granted a pardon months after his former wife gave "roughly \$1 million in contributions to Democratic candidates" including "\$450,000 to Clinton's presidential library fund."¹⁶⁴ Numerous politicians were quick to publicly note the corrupt appearance of the situation¹⁶⁵ including former Clinton Labor Secretary, Robert Reich, who stated "if there ever was an argument for campaign finance reform, this is it."¹⁶⁶ The prevalence and magnitude of political scandals such as these makes it evident that current financing regulations, which evolved from *Buckley* and its progeny, fail to prevent corruption within the electoral process.¹⁶⁷

Existing campaign finance regulations failed to prevent the appearance of corruption within the electoral process and the voter disenchantment that accompanies it. Newspapers and magazines abound with articles and commentaries discussing the average American's disgust and disinterest with politics and voting.¹⁶⁸ Former U.S. Senator, Presidential candidate and reform proponent, Bill Bradley, once stated that "money is to politics what acid is to cloth—it eats away at the fabric of Democracy."¹⁶⁹ Archibald Cox, constitutional law expert and

164. *Id.*

165. See *id.* (quoting several outraged politicians, such as Sen. Dianne Feinstein (D-Cal.) who voiced "concerns not only about the Rich pardon but about a number of others" and Sen. Charles Schumer (D-N.Y.) who maintained the Clinton pardons made a "mockery of the system").

166. See *Fox News: The Edge With Paula Zahn* (FOX television broadcast, Jan. 24, 2001) (responding to questions regarding whether the Rich pardon was influenced by large political contributions). Secretary Reich referred bluntly to the corrupt appearance of the transaction: "it smells bad and it looks bad." *Id.*

167. See *supra* notes 146-61 and accompanying text (examining numerous instances of political corruption within the past two decades).

168. See, e.g., Jeff Barker, *McCain Adamant on Campaign Finance*, ARIZ. REPUBLIC, July 1, 1999, at 1 (reporting John McCain's positions on campaign finance reform and quoting Arizona Representative Kathleen Flora's opinion that "[a] lot of people are feeling cynical or disenchanted with government today"); Aaron Bernstein, *Too Much Corporate Power?*, BUS. WEEK, Sept. 11, 2000, at 144 (examining public distrust of large corporations and their influence on politics); Peter D. Cimini, *Address the Scandal of Campaign Finance*, HARTFORD COURANT, Nov. 6, 1999, at A16 (referring to polls that show the public thinks the system is corrupt).

169. See BILL BRADLEY, *THE JOURNEY FROM HERE* 84 (2000). Senator Bradley recalled experiences on the Senate Finance Committee when public meetings involving interests important to specific groups were aligned with special interest lobbyists while other meetings regarding issues of general welfare were virtually unattended. See *id.* at 86. He found that money seriously distorts the principle of "one person . . . one vote" and concluded that those with more money have more political clout. *Id.* at 87.

former Watergate prosecutor, also voiced his concerns regarding the current regulations and maintains that “campaign finance abuses are far worse today than during Watergate.”¹⁷⁰

Numerous polls indicate cynicism is widespread among voters, particularly among the young.¹⁷¹ Many attribute this high level of distrust among voters to their perception that the political system is corrupt.¹⁷² It is clearly evident that current campaign

170. CHARLES LEWIS, *THE BUYING OF THE PRESIDENT 2000* 5 (2000) (reporting comments made by Archibald Cox in an interview) Mr. Cox also concluded that Americans have “much less trust in government today than there was during the Watergate years”).

171. See Meredith Kruse & Ian Zack, *Poll: Campaign Funds Concern Voters*, VA. PILOT, Nov. 22, 1999, at A1 (reporting on a 1999 poll indicating that voters believe money improperly influences politicians). This poll conducted in 1999 by The Old Dominion University's Social Science Research Center, reported that “half of all voters think state legislators' votes are for sale” and that “[o]nly three out of ten people think that their representative has a high ethical standard.” *Id.* In addition, eighty-three percent of Virginia voters polled thought too much money was spent on campaigns. *Id.*; see also Alexa Aguilar, *Southern Illinois U.: Elusive Young Voters Could Swing Election*, U-WIRE, Sept. 7, 2000, available at 2000 WL 24492243 (referring to poll showing disinterest in the election by voters aged eighteen through twenty-four). This poll conducted that same year by Project Vote Smart, found that “24 percent of all potential voters aged 18-24 did not trust any level of government, with only 9 percent claiming they trusted the federal government.” *Id.* The author noted that student participation in elections is low and cited statistics for a predominantly student precinct showing only eleven percent of those registered actually voted in 1998. *Id.* Despite efforts that targeted specifically at mobilizing this age group, such as MTV's “Choose or Lose,” “Rap the Vote,” and the “WWF Smackdown Your Vote!,” many students feel disconnected from the process. *Id.*; see also Kathryn E. Smith, *U. Southern Mississippi: Apathy Among Young Voters Alive Despite Upcoming Election*, U-WIRE, Aug. 24, 2000, available at 2000 WL 24490193 (noting results of poll showing people aged eighteen through twenty-four are voting in smaller numbers).

172. See Kruse & Zack, *supra* note 171, at A1 (citing various opinions regarding corruption within the system). Old Dominion University Professor Stephen K. Medvic concluded that voter cynicism “begins to show a corrupting effect of money on our society.” *Id.* A state delegate from Arlington, Virginia, Robert H. Brink, voiced his concern that “campaigns are getting so expensive and negative that we've driven participation and faith in the system down and down in a downward spiral.” *Id.* at A10. Finally, a private contractor stated his opinion that “people are buying what they want with these large campaign contributions.” *Id.* at A1; see also Smith, *supra* note 171 and accompanying text (relaying the conclusion of University of Southern Mississippi Professor Ronald Marquardt that “young voters often cite corruption [and] big money” as reasons for not voting); Diane Carman, *It's Back to “Reform” School*, DEN. POST, Jan. 4, 2000, at B1 (concluding that “[t]he corruption of the process by big money has alienated a whole generation of young voters who see participation in the democratic process as an insulting waste of time”). There are indications that some voters feel differently as was cited in a *Detroit News* article discussing

finance regulations are failing to prevent the appearance of corruption within the electoral process.¹⁷³

In response to the failure of current campaign finance regulations, numerous alternatives to FECA were proposed or enacted.¹⁷⁴ Thus far the greatest success is found at the state and local levels.¹⁷⁵ Several states including Maine and Arizona, implemented public financing programs for all general campaigns.¹⁷⁶ New York City instituted a matching fund program for all candidates who abide by expenditure limitations.¹⁷⁷

Efforts to reform federal regulations did not find similar success.¹⁷⁸ One of the most visible legislative efforts to pass

a nationwide poll that finds "Americans are more moderate . . . less cynical about government and more supportive of Democratic positions" than they were five years earlier. Will Lester, *Voters More Moderate, Less Angry: Poll Reveals Mood Shift in Political Landscape From Distrust of 1994*, DET. NEWS, Nov. 12, 1999, at A7. The lowest voter turnout ever for a Presidential election was reported in 1996, with only half of eligible voters participating. LEWIS, *supra* note 146, at 9. Although Americans are not expressing their views at the ballot box, they are venting their frustrations through other means. Citizens in California, for example, demonstrated at the state capital to protest the alleged influence large contributors held over the Governor's environmental policies. See *Fund Raising By California Governor is Criticized, Even By His Own Party*, ST. LOUIS POST-DISPATCH, Oct. 12, 2000, at A13. A ninety-year-old woman, "Granny D," walked from coast to coast in support of public financing for elections. Abby Schier, *Cleaning Up Politics, Clearing Out Big Money*, DOLLARS & SENSE, July/Aug. 2000, at 24. Many citizens have expressed their anger and distrust over the electoral system through Letters to the Editor. See, e.g., Barbara C. Lea, *Letters to the Editor Already Cynical Voters More Turned Off by Ads*, PALM BEACH POST, Oct. 7, 2000 (admonishing politicians for running negative advertisements and vowing to refrain from watching television until after November 7, 2000).

173. See *supra* notes 168-71 (discussing the public's perception that politicians in general are corrupt).

174. See Campaign Finance Reform and Disclosure Act of 2000, S. 2565, 106th Cong. (2000) (proposing reducing PAC limitations, restricting out-of-state donations to Senators, and prohibiting non-citizens from making contributions); Citizen Legislature and Political Freedom Act, H.R. 965, 105th Cong. (1997) (proposing elimination of contribution limitations and the Presidential Election Campaign Fund and increasing disclosure requirements).

175. See *infra* notes 176, 177 (describing several successful campaign finance reforms instituted at the state and local levels).

176. See BRADLEY, *supra* note 169, at 92 (describing public financing systems that provide public funds for candidates willing to forego private donations). In addition to Maine and Arizona, Vermont and Massachusetts have similar programs. *Id.* at 93.

177. See *id.* at 92 (referring to the city plan that makes a four to one match on all donations under the amount of \$250 for candidates agreeing to expenditure limitations).

178. See *infra* notes 179-184 and accompanying text (describing failed

comprehensive campaign finance reform is the McCain-Feingold bill.¹⁷⁹ Among its proposals, the legislation calls for a complete ban on soft money, an increase in hard money contribution limits, and restrictions on the airing of issue advertisements within sixty days of a general election and thirty days of a primary.¹⁸⁰ Although McCain-Feingold has many supporters and is currently the most visible reform effort,¹⁸¹ many fear it will not withstand inevitable judicial scrutiny.¹⁸² Congress faces a huge task in structuring a system that is both fair and less reliant on money while still practical enough to provide for individual campaigning needs.¹⁸³ It is apparent that legislative efforts to reform campaign finance regulations will continue to face obstacles in the future.¹⁸⁴

B. Nixon v. Shrink Missouri Government PAC: Supreme Court's Latest Confirmation of Buckley

In *Nixon v. Shrink Missouri Government PAC*,¹⁸⁵ the Supreme Court again considered the constitutionality of campaign

federal efforts to reform campaign finance regulations).

179. Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001) (proposing comprehensive campaign finance reforms including a ban on soft money, better monitoring of independent expenditures, and an increase in hard money contribution limits).

180. Helen Dewar, *Campaign Finance Bill Clears Big Hurdle: Senate Schedules Final Vote Monday on McCain-Feingold*, WASH. POST, Mar. 30, 2001, at A6.

181. See Jim Camden, *Senate Race About Dollars and Change: Candidates Spend Millions to Define Themselves*, SPOKESMAN REV., Nov. 2, 2000, at A1 (referring to the McCain-Feingold Bill as the "most visible campaign finance bill").

182. See Ruth Marcus & Juliet Eilperin, *Campaign Bill Could Shift Power Away From Parties*, WASH. POST, Apr. 1, 2001, at A9 (speculating that McCain-Feingold will be met with an immediate constitutional challenge in the courts); see also *A Wobble on Campaign Finance*, WASH. POST, Mar. 28, 2001, at A22 (referring to a section of McCain-Feingold that prohibits the use of corporate and union funds to run issue ads within weeks of an election as "a provision the courts are quite likely to strike down . . . as a violation of the First Amendment"); Michael Kelly, *McCain-Feingold's Fatal Flaws*, WASH. POST, Apr. 5, 2001, at A27 (predicting that the "courts will gut McCain-Feingold from stem to stern").

183. See John Lancaster, *Campaign Finance Bill's Big Test: Can Measure Be Geared To Survive Court Challenges to Parts?*, WASH. POST, Mar. 28, 2001, at A14 (quoting the concerns of Sen. Patty Murry (D-Wa.): "[w]e ought to be able to pass a bill that is fair to all parties . . . I really do think people want to change the system and reduce the amount of money.").

184. See *supra* notes 178-182 and accompanying text (examining the difficulties reform efforts encounter).

185. 528 U.S. 377 (2000).

contribution limits and once again upheld the restrictions.¹⁸⁶ At issue in *Nixon* was a Missouri statute that imposed campaign contribution limitations similar to FECA, ranging from \$250 to \$1000, depending on the office sought.¹⁸⁷ The action, initiated by a PAC and an individual seeking state office,¹⁸⁸ challenged the constitutionality of contribution limitations by arguing that such restraints violate the First and Fourteenth Amendments.¹⁸⁹ The U.S. District Court for the Eastern District of Missouri upheld the statute relying on precedent set in *Buckley* that allowed such limitations to prevent voter suspicion and distrust of large campaign contributions.¹⁹⁰ The U.S. Court of Appeals for the Eighth Circuit reversed, finding that the state was unable to prove through demonstrable evidence the compelling interest necessary to validate a statute that infringes upon constitutional rights.¹⁹¹ Citing the large number of states enacting similar statutes, the Supreme Court granted certiorari to consider the "congruence of the Eighth Circuit's decision with *Buckley*."¹⁹²

1. *The Majority Upholds Buckley by Strictly Deciding the Case Before It*

A six-to-three majority of the Court reversed the Eighth Circuit,¹⁹³ finding that *Buckley* provided direct authority and

186. *Id.* at 397-98 (relying on precedent in *Buckley* to uphold the Missouri statute).

187. *Id.* at 382 (quoting the statute: "[t]o elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, [[t]he amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed] one thousand dollars").

188. *Id.* at 383.

189. *See id.* (noting that respondents had not specifically identified the alleged constitutional violations, but the Court assumed they were for "free speech, association and equal protection").

190. *See Shrink Mo. Gov't PAC v. Adams*, 5 F. Supp. 2d 734, 738 (E.D. Mo. 1998) (upholding statutory limitations on campaign contributions).

191. *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 521-22 (8th Cir. 1998) (demanding that the state provide "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place").

192. *See Nixon*, 528 U.S. at 385. The majority consisted of Chief Justice Rehnquist, Justices Souter, O'Connor, Stevens, Breyer, and Justice Ginsburg. *Id.* Justices Kennedy, Thomas, and Scalia dissented. *Id.*

193. *See id.* at 390-92 (directly reversing the lower court's holding requiring demonstrable evidence of corruption within the electoral process).

precedent for the Missouri limits.¹⁹⁴ The opinion, authored by Justice Souter, began by reviewing the judicial scrutiny used in *Buckley* and reiterating the distinction between contribution and expenditure limitations.¹⁹⁵ Following *Buckley*, the Court determined that limitations on expenditures were unconstitutional because they were a direct restraint on speech,¹⁹⁶ but similar limits on contributions were permissible because of their marginal effect on speech.¹⁹⁷ The Court reasserted that a regulation enacted to advance a “sufficiently important interest,”¹⁹⁸ which does so in a “closely drawn” manner,¹⁹⁹ is acceptable as a marginal restraint on speech.²⁰⁰ The Court determined that the Missouri law only marginally restrained free speech and consequently upheld the statute.²⁰¹

194. See *id.* at 382 (“We hold *Buckley* to be authority for comparable state regulation.”).

195. See *id.* at 386 (explaining that the *Buckley* Court did not clearly identify the judicial scrutiny employed in its decision). The Court noted that neither the intermediate scrutiny of *United States v. O’Brien*, 391 U.S. 367 (1968), nor that utilized for time, place, and manner restrictions were adopted in *Buckley*. *Id.* The Court described the level of judicial review as “the exacting scrutiny required by the First Amendment.” *Id.* (quoting *Buckley*, 424 U.S. at 16).

196. See *Nixon*, 528 U.S. at 386 (determining that “expenditure restrictions [are] direct restraints on speech”).

197. See *id.* at 386-87 (relying on *Buckley* to hold that a contribution limit “involves little direct restraint on . . . [the contributor’s] political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues”).

198. *Id.* at 388. The Court held that “[t]he prevention of corruption and the appearance of corruption,” were found to be “constitutionally sufficient justifications” for infringing on constitutional rights. *Id.* The Court supported this holding by concluding that unchecked corruption, or the appearance thereof, would cause voters to lose confidence in the electoral process and would weaken the political system in general. *Id.* at 388-89.

199. *Id.* at 387. The means employed in a statute must be narrow and specific and must not “sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

200. *Nixon*, 528 U.S. at 387. The Court extended the analysis to include association rights, finding the same distinction between contributions and expenditures. See *id.* The Court stated that an “expenditure limit ‘precludes most associations from effectively amplifying the voice of their adherents’ . . . [however, the contribution limits] ‘leave the contributor free to become a member of any political association and to assist personally in the association’s efforts on behalf of candidates.’” *Id.* (quoting *Buckley*, 424 U.S. at 22).

201. *Id.* at 392-93. In reaching this holding, the Court concluded that it was permissible for Congress to legislate against less obvious forms of corruption, stating that “Congress could constitutionally address the power of money ‘to influence governmental action’ in ways less ‘blatant and specific’ than bribery.”

The majority also responded to criticisms by the dissenters that the Court did not address the consequences of *Buckley* and whether the standard should be overruled,²⁰² which the dissenters called the "real issue[s]" before the Court.²⁰³ The majority did not robustly defend the merits of *Buckley*, but instead relied upon the argument that the Court was required to only decide the narrow issues presented in *Nixon*.²⁰⁴ The majority argued that the petitioners had not asked that *Buckley* be overruled and it was thus not appropriate for the Court to consider such action.²⁰⁵ Although the concurring and dissenting opinions argued strongly for the Court to consider the practical and political consequences of its past decisions,²⁰⁶ the majority believed its sole task was to consider the narrow legal issues relating to the Missouri statute and to follow precedent.²⁰⁷ The Court concluded that the statute was not unconstitutional and subsequently reversed and remanded the case for action consistent with its decision.²⁰⁸

Id. at 389 (quoting *Buckley*, 424 U.S. at 28). The Court also determined that additional demonstrable evidence was not necessary to prove the nexus between large contributions and political corruption. *See id.* at 391-92. The Court found the evidence presented during lower court proceedings, such as "newspaper accounts of large contributions supporting inferences of impropriety" and the fact that Missouri voters had passed a ballot initiative to strictly limit campaign contributions, to be adequate. *Id.* at 393-94. Finally, the Court reasoned that the limitations were not preventing candidates from raising the necessary funds to seek office and thus should be allowed. *See id.* at 395-96.

202. *See id.* at 397 (recognizing that the "dissenters in this case think our reasoning evades the real issue").

203. *Id.* (Kennedy, J., dissenting) (arguing that the Court does "much disservice to our First Amendment jurisprudence by failing to acknowledge or evaluate the whole operation of the system that we ourselves created in *Buckley*"). Justice Thomas also criticized the majority for "blindly" following precedent set in *Buckley* and failing to consider subsequent breakdowns of the logic distilled in that decision. *Id.* at 420-21.

204. *See id.* at 397 (responding to calls from the other Justices to consider the policy implications of its holding by stating that "[t]he answer is that we are supposed to decide this case").

205. *See id.* (stating that petitioners "did not request that *Buckley* be overruled").

206. *See infra* Parts II.B.2-B.3 (calling for the Court to consider factors such as soft money issue advocacy and the capacity of the legislature to address the problem).

207. *Nixon*, 528 U.S. at 397-98. The Court asserted that "[t]here is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern *this case* in support of the Missouri statute." *Id.* (emphasis added).

208. *See id.* (proclaiming its confidence in relying on *Buckley* precedent).

2. The Concurring Opinions: Money Is Property and Balancing of Interests

Justice Stevens and Justice Breyer authored separate opinions.²⁰⁹ Although both opinions agreed with the judgment upholding the *Buckley* precedent, neither was satisfied with the analytical approach utilized by the majority to evaluate campaign finance matters.²¹⁰

Justice Stevens noted the dissenters' call to reexamine the *Buckley* decision²¹¹ and wrote solely to assert his view that contribution limits should be analyzed not as a First Amendment, issue but rather as property and liberty concerns.²¹² In a brief opinion, he colorfully described the differences between free speech and property issues and concluded that the Constitution affords greater protection to the former.²¹³ Justice Stevens maintained that contribution limitations involve property rights and as such should be evaluated under a lower standard of review than that applied by the majority.²¹⁴

In his concurring opinion, Justice Breyer, who was joined by Justice Ginsburg, countered Justice Stevens's contention that contribution limitations do not warrant First Amendment protection by arguing that "a decision to contribute money to a campaign is a matter of First Amendment concern--not because

209. *Id.* at 398-400 (Stevens, J., concurring) (writing separately to assert his view that the issue did not relate to rights of free speech but instead to property and liberty concerns); (Breyer, J., concurring) (agreeing with the Court's outcome but addressing the issue of judicial scrutiny and the proper role of the Court).

210. *See id.* at 389-405 (Stevens, J., concurring) (challenging the Court to consider a different approach to evaluating campaign finance laws).

211. *Id.* at 398 (Stevens, J., concurring) (responding to Justice Kennedy's suggestion to re-examine FECA provisions) as though Justice Stevens does not explicitly state his willingness to reconsider *Buckley*, it may be inferred because he contends that the scrutiny standard utilized in *Buckley* is faulty, he would support a reevaluation of *Buckley* precedent. *See id.* at 398-99.

212. *Id.* at 398-99 (supporting his assertion with an example: "[t]elling a grandmother that she may not use her own property to provide shelter to a grandchild—or to hire mercenaries to work in that grandchild's campaign for public office—raises important constitutional concerns that are unrelated to the First Amendment").

213. *See id.* (Stevens, J., concurring).

214. *Id.* (Stevens, J., concurring) (maintaining that property rights are entitled to legal protection, but not the maximum protection afforded First Amendment rights).

money is speech (it is not); but because it enables speech."²¹⁵ Justice Breyer asserted that campaign finance regulations are entitled to thoughtful review but argued that the use of strict scrutiny, proposed by Justice Thomas's dissenting opinion,²¹⁶ was inappropriate.²¹⁷

Strict scrutiny and its presumption against constitutionality, Breyer maintained, was not an appropriate standard for analyzing statutory limitations on campaign contributions.²¹⁸ Justice Breyer suggested that a better approach was to balance the conflicting interests present in campaign finance cases, specifically the right of free speech and the integrity of the electoral system.²¹⁹ Unlike the majority, Justice Breyer argued that the Court was not restricted to considering only the statutory limits of the Missouri law.²²⁰ Instead, Justice Breyer suggested that the Court should also address the implications of the decision on campaign finance issues at large.²²¹

In concurring with the majority's judgment, Justice Breyer agreed that contribution limits were constitutional because their effect did not prohibit speech but rather "permit[ted] all

215. *Id.* at 911 (Breyer, J., concurring) (discussing the associational aspects of contributing, namely that a contributor helps a candidate who espouses his beliefs to become elected).

216. *Id.* at 916 (Thomas, J., dissenting) (arguing that political speech represents core First Amendment activity, thus laws abridging that activity should be "met with the utmost skepticism and should receive the strictest scrutiny").

217. *Id.* at 911 (Breyer, J., concurring) (agreeing with Justice Thomas that political speech "lies at the heart of the First Amendment" but arguing against strict scrutiny because constitutionally protected interests were at issue on both sides, and the "strong presumption against constitutionality" was thus inappropriate).

218. *See id.* at 911 (Breyer, J., concurring) (asserting that there is "no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny'").

219. *See id.* at 912 (Breyer, J., concurring) (maintaining that the Court's primary consideration should be whether one party was burdened under the law to a greater degree than the other).

220. *Id.* at 910-11 (Breyer, J., concurring) (referring to the difficult constitutional problems raised by campaign finance regulation). Justice Breyer, unlike the majority, acknowledged the conflicting constitutional interests and recognized the issues involved reached beyond a mere determination of Respondents' rights. *See id.*

221. *See id.* at 401 (Breyer, J., concurring). Generally, Justice Breyer contends that limitations "democratize the influence that money itself may bring to bear upon the electoral process" by forcing candidates to seek a broader base of contributors. *Id.*

supporters to contribute the same amount of money, in an attempt to make the process fairer and more democratic.”²²² In Breyer’s opinion, the holding protected the rights of contributors to express their views and also provided for a more equal political system.²²³ Thus, Breyer argued that the outcome was a just balancing of conflicting interests.²²⁴ Justice Breyer presumed the Court’s holding was in accordance with legislative purposes,²²⁵ but stated unequivocally that the Constitution demands that the Court reconsider *Buckley* if the Court’s action inadvertently blocks prospective comprehensive campaign finance legislation.²²⁶ It can be inferred therefore, that Justices Breyer and Ginsburg would consider reevaluating *Buckley*.²²⁷

3. The Dissenters: Covert Speech and Strict Scrutiny Analysis

The most passionate examinations of the current state of campaign finance controls, as well as the Court’s role in molding that area of law, were offered in the dissenting opinions of Justice Kennedy²²⁸ and Justice Thomas.²²⁹ Though they argued for opposite solutions, both emphatically call for *Buckley* to be

222. *Id.* (Breyer, J., concurring) (countering the criticism that contribution limitations cannot be imposed to enhance the voice of non-contributing individuals).

223. *See id.* (Breyer, J., concurring) (stating that “the statute imposes restrictions of degree”). The contributor is still allowed to associate himself with a chosen candidate, but by limiting the amount that may be contributed the relative influence of other participants is increased and the electoral process is subsequently more democratic. *See id.*

224. *See id.* at 403 (Breyer, J., concurring) (concluding that in “[a]pplying this approach [balancing of interests] to the present case, I would uphold the statute essentially for the reasons stated by the Court”).

225. *See id.* (Breyer, J., concurring) (referring to the broad discretion *Buckley* granted to the legislature in formulating campaign finance regulations and concluding that the “legislature understands the problem . . . better than do we”). Justice Breyer used as evidence of this discretion the fact that the legislature had chosen to act on some issues, such as public financing of elections, but not on others, such as reduced-price media time. *See id.*

226. *See id.* at 913-14 (agreeing with Justice Kennedy that if “*Buckley* denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance . . . the Constitution would require us to reconsider *Buckley*”).

227. *See id.* (stating specifically that a re-evaluation of the contribution and expenditure distinction may be in order).

228. *See infra* notes 234-44 and accompanying text (considering the dissenting arguments of Justice Kennedy).

229. *See infra* notes 245-59 and accompanying text (examining the dissenting opinion of Justice Thomas).

overruled.²³⁰ Justice Kennedy, in his dissenting opinion, supported limitations on both contributions and expenditures.²³¹ Justice Thomas, on the other hand, argued adamantly against contribution limitations.²³² Both Justices recognized that the Court's acceptance of their respective opinions would reach beyond the narrow issue presented in *Nixon*, but still they both called for an extensive reformulation of the campaign finance system.²³³

Justice Kennedy challenged the majority's reliance on the principle of stare decisis in reaching its decision.²³⁴ Kennedy fervently argued that the Court could not rely on precedent unless it had the "capacity, and responsibility, to acknowledge its missteps."²³⁵ The Court had, in Kennedy's estimation, misstepped in its campaign finance decisions,²³⁶ and it was time

230. See *Nixon*, 528 U.S. at 915-16 (Kennedy, J., dissenting) (asserting repeatedly his opinion that *Buckley* should be overruled because "*Buckley* has not worked"). Justice Thomas provided an equally hostile treatment of *Buckley* referring to the "analytic fallacies of our flawed decision in *Buckley*." *Id.* at 916 (Thomas, J., dissenting).

231. *Id.* at 916 (Kennedy, J., dissenting) (suggesting "a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising").

232. *Id.* at 916 (Thomas, J., dissenting) (finding contribution limits "patently unconstitutional"). Though not explicitly stated in *Nixon*, Justice Thomas advocates annulling all campaign financing limitations from prior decisions. See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996). In *Colorado Republican Federal Campaign Committee*, Justice Thomas reiterated Chief Justice Burger's comment from *Buckley* that "contributions and expenditures are two sides of the same First Amendment coin." *Id.* at 636 (quoting *Buckley*, 424 U.S. at 241). Justice Thomas explicitly stated his conviction "that under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process . . . are unconstitutional." *Id.* at 640-41 (Thomas, J., dissenting).

233. See *Nixon*, 528 U.S. at 405 (Kennedy, J., dissenting). Justice Kennedy supported overruling *Buckley* and allowing the legislature to create a new regulatory structure for campaign finance. *Id.* at 409-10. Likewise, Justice Thomas described the analytical foundation of *Buckley* as "tenuous" and "eroding" and argued that there is no adequate justification for continuing a system that unconstitutionally limits contributions. *Id.* at 412 (Thomas, J., dissenting).

234. See *id.* at 405 (Kennedy, J., dissenting) (dismissing the idea that the case represented a "routine application of our analysis in *Buckley*").

235. *Id.* at 406 (Kennedy, J., dissenting) (reasoning that "[t]he justifications for the case system and stare decisis must rest upon the Court's capacity, and responsibility, to acknowledge its missteps").

236. See *id.* (Kennedy, J., dissenting) (maintaining that the Court failed to respond to the adverse consequences of its *Buckley* decision, but instead

for the Court to accept responsibility for the adverse, unintended consequences resulting from such decisions.²³⁷ Justice Kennedy maintained that the rules established in *Buckley* did not lead to a fairer electoral process but in fact caused the subversion of political speech.²³⁸ He explained that by upholding only half of FECA's original provisions,²³⁹ the Court created a "misshapen system, one which distorts the meaning of speech."²⁴⁰ The Court's complex campaign finance holdings did not limit the influx of large amounts of cash in elections but merely caused candidates to utilize loopholes allowing unregulated practices such as "issue advocacy" advertisements²⁴¹ and "soft money" contributions.²⁴²

"perpetuates and compounds a serious distortion of the First Amendment resulting from our own intervention in *Buckley*").

237. See *id.* (Kennedy, J., dissenting) (describing the unintended consequences of the current reliance by candidates on "soft money," which is unregulated contributions to political parties that is often used to sponsor "issue advocacy" advertisements). Justice Kennedy concluded his opinion by stating that the Court should overrule *Buckley* to prevent further consideration of First Amendment issues under, what he labels, "the artificial" campaign finance system." *Id.* at 410.

238. *Id.* (Kennedy, J., dissenting) (explaining that *Buckley* had not improved campaign financing, but had forced politicians to be more covert in their actions).

239. See *id.* at 406-07 (Kennedy, J., dissenting).

240. *Id.* at 407 (Kennedy, J., dissenting).

241. *Id.* at 406-07 (Kennedy, J., dissenting) (describing how issue advocacy advertisements, paid for by unregulated contributions to political parties, act as covert commercials for the candidate). Justice Kennedy maintained that issue advocacy advertisements have led to "an indirect system of accountability that is confusing, if not dispiriting, to the voter." *Id.* at 408. His argument has been voiced by others including political scientist Anthony Corrado who explained the detrimental effects of issue advocacy upon the electoral system:

When campaign funds are raised and spent by candidates or political parties in coordination with candidates, the ballot provides accountability; candidates can be voted in or out of office, and parties can be voted in or out of legislative control. But when individuals or groups not formally affiliated with candidates or parties acting independently of candidates are engaged in political spending, the efficacy of the ballot box as a means of promoting accountability is diminished. This lack of accountability makes it more difficult for voters to hold elected officials accountable for the manner in which they conduct their campaigns, which can be an important voting cue for citizens

Anthony Corrado, *On the Issue of Issue Advocacy: A Comment*, 85 VA. L. REV. 1803, 1808 (1999).

242. *Nixon*, 528 U.S. at 406 (attributing the rise in soft money issue advocacy by political parties to the system created in *Buckley*). Justice Kennedy argued that *Buckley* "forced a substantial amount of political speech underground, as

The core of Justice Kennedy's opinion was that the system established by *Buckley* did not work.²⁴³ The Court needed to make amends for its past mistakes by overturning the decision so that Congress could enact new legislation that would allow elected officials to focus their time and efforts on governing rather than fundraising.²⁴⁴

In a separate dissenting opinion, Justice Thomas, who was joined by Justice Scalia, also called for the elimination of the *Buckley* standard.²⁴⁵ His opinion was grounded in the principle that both campaign expenditures and contributions were forms of speech that should be protected vigorously and equally.²⁴⁶ Justice Thomas challenged the assumption that contribution limitations are marginal restraints that are entitled to a lesser degree of constitutional protection.²⁴⁷ He maintained that in

contributors and candidates devise[d] ever more elaborate methods of avoiding contribution limits," which led advertisements to conceal the real purpose of the speech. *Id.*

243. See *id.* at 408 (noting that the campaign finance system established in *Buckley* has generated dangers, namely covert speech, that are as serious as those it was created to eliminate).

244. See *id.* at 409 (arguing that it was time to "open the possibility that Congress . . . might devise a system . . . permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"). Although Justice Kennedy was hopeful that Congress would create a system that limited both contributions and expenditures, he noted his concern that the legislature would be unable to do so. See *id.* According to Justice Kennedy, "the existing distortion of speech caused by the half-way house we created in *Buckley* ought to be eliminated." *Id.* at 410. Although Justice Kennedy intended for Congress to formulate a new campaign finance regulations, he was unwilling to maintain the *Buckley* system until such legislation was enacted and called for the immediate elimination of the *Buckley* "half-way house." *Id.*

245. *Id.* (Thomas, J., dissenting) (declaring that "our decision in *Buckley* was in error, and I would overrule it").

246. See *id.* at 413 (Thomas, J., dissenting). Justice Thomas did not agree that contribution limitations were only a marginal restraint on free speech or that there was a qualitative difference between contributing to a candidate or directly spending money. See *id.* He argued that all speech involved input by individuals other than the speaker and the fact that a contributor enabled speech by one other than himself should not lessen its constitutional value. See *id.* He reasoned that "[e]ven in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message—for instance, an advertising agency or a television station." *Id.*

247. See *id.* (Thomas, J., dissenting) (arguing that limits force contributors to employ less effective means of communicating a chosen message). According to Justice Thomas "[t]he decision of individuals to speak through contributions rather than through independent expenditures is entirely reasonable." *Id.* at 415. Reasonable because candidates generally utilize the money in a more productive manner. See *id.* at 416. As Justice Thomas explains, "[c]ampaign

practice contribution limitations directly restrained free speech²⁴⁸ and the majority, by applying its own unique and less stringent level of scrutiny, was obstructing constitutionally protected speech²⁴⁹ and limiting the voice of the people.²⁵⁰

Justice Thomas's other principal argument for renouncing *Buckley* focused on the improper level of scrutiny traditionally used by the Court in adjudicating campaign finance cases.²⁵¹ The *Buckley* Court never clearly articulated its "exacting scrutiny" standard,²⁵² and Justice Thomas asserted that the Court should demand nothing less than strict scrutiny because of the First Amendment implications.²⁵³ He argued that under strict scrutiny the limitations would fail because the State of Missouri lacked both the requisite compelling interest²⁵⁴ and the

organizations offer a ready-built, convenient means of communicating for donors wishing to support and amplify political messages." *Id.*

248. See *id.* at 417 (Thomas, J., dissenting) (asserting that contribution limitations do, in fact, restrain speech because that discount the "distinct role of candidate organizations as a means of individual participation in the nation's civic dialogue").

249. See *id.* at 410 (Thomas, J., dissenting) (concluding that the majority, by not applying strict scrutiny, has "balance[d] away First Amendment freedoms").

250. See *id.* at 420 (Thomas, J., dissenting) (arguing that decisions regarding "who shall speak, the means they will use, and the amount of speech sufficient to inform and persuade" were issues properly determined by the citizens and candidates and not the government).

251. See *id.* at 421 (Thomas, J., dissenting) (admonishing the majority for applying "something less—much less—than strict scrutiny").

252. See *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam) (referring to the judicial scrutiny to be applied in the case as "the exacting scrutiny required by the First Amendment"). Questions relating to the standard of review utilized in *Buckley* remain unsettled. See Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1050 (1985) (discussing the Court's failure to apply a consistent standard of review in post-*Buckley* campaign finance cases); see also Jane Conard, *Nixon v. Shrink Missouri Government PAC: Campaign Contributions, Symbolic Speech and the Appearance of Corruption*, 33 AKRON L. REV. 551, 552 (2000) (arguing that courts apply various standards of review in cases involving campaign finance because the *Buckley* decision was ambiguous on this point); James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. L. REV. 235, 240 (1999) (noting that "the scrutiny to be applied to contribution limits is still an open exercise, due primarily to the Supreme Court's inconsistent use of key language").

253. *Nixon*, 528 U.S. at 427 (Thomas, J., dissenting) ("In light of the importance of political speech to republican government, Missouri's substantial restriction of speech warrants strict scrutiny").

254. See *id.* at 423 (Thomas, J., dissenting) (reminding the Court that the only interest held "compelling" and thus sufficient to restrict political contributions is that associated with reducing corruption or the appearance of

narrowly tailored means.²⁵⁵ Justice Thomas concluded by reminding his colleagues that political speech was the core of First Amendment protection²⁵⁶ and by admonishing the majority for providing greater protection to judicially defined forms of speech, such as nude dancing²⁵⁷ and flag burning,²⁵⁸ than to an essential conduit of political speech.²⁵⁹

corruption). Justice Thomas argued that the majority extended the meaning of corruption far beyond what is reasonable and he reproved the majority for permitting "vague and unenumerated harms to suffice as a compelling reason for the government to smother political speech." *Id.* at 424.

255. See *id.* at 427-28 (Thomas, J., dissenting) (asserting the statute is overinclusive). Justice Thomas argued the Missouri statute is both broader in scope and more restrictive than the FECA provisions upheld in *Buckley*. *Id.* at 424-25 (Thomas, J., dissenting). Justice Thomas noted that although *Buckley* limited contributions to \$1000 for individuals and \$5000 for political committees, the Missouri statute imposes limits on both ranging from \$250 to \$1000; these limitations are even harsher, he argued, when inflation is considered. *Id.* at 425 (Thomas, J., dissenting). Justice Thomas also challenged the majority's contention that the statute does not limit the fundraising totals by a candidate. *Id.* (Thomas, J., dissenting). Justice Thomas argued that because "the largest contributors provide a disproportionate amount of funds" limiting such contributions must affect total amounts raised. *Id.* at 426 (Thomas, J., dissenting). On the other hand, Justice Thomas noted that if "large contributions provide very little assistance to a candidate . . . the Court fails to explain why a candidate would engage in 'corruption' for such a meager benefit." *Id.* (Thomas, J., dissenting). Justice Thomas maintained further that a more narrowly tailored means, such as bribery and disclosure laws, exist to prevent corruption within the electoral process. *Id.* at 428 (Thomas, J., dissenting). Justice Thomas concluded the limitations were poorly drafted and overly inclusive, and did little more than "directly suppress the political speech of both contributors and candidates, and only clumsily further[ed] the governmental interests that they allegedly serve." *Id.* (Thomas, J., dissenting).

256. *Id.* at 410-11 (Thomas, J., dissenting) (asserting that the Founding Fathers guaranteed free speech for political purposes so the self-governed could exchange political information). Justice Thomas argued that "that free exchange should receive the most protection when it matters the most—during campaigns for elective office." *Id.* at 411 (Thomas, J., dissenting).

257. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opinion) (holding that nude dancing is expressive conduct protected by the First Amendment).

258. See *United States v. Eichman*, 496 U.S. 310, 317-18 (1990) (finding unconstitutional the Flag Protection Act of 1989, which prohibits the knowing mutilation, defacement, burning, or trampling upon the United States flag).

259. See *Nixon*, 528 U.S. at 411-12 (Thomas, J., dissenting) (maintaining contributions represent political speech).

III. THE SIGNIFICANCE OF *NIXON*: MEMBERS OF THE COURT MOVE IN VARIOUS DIRECTIONS ON CAMPAIGN FINANCE REFORM

A. *The Court's Dissatisfaction with Current Campaign Finance Regulation Is Clearly Evident in Nixon v. Shrink Missouri Government PAC*

It has been twenty-five years since *Buckley* was decided and one could argue that efforts to reform campaign financing have failed miserably.²⁶⁰ *Nixon* was decided in the wake of huge expenditures during the 1996 presidential campaign and the subsequent scandals that accompanied those campaign finance practices.²⁶¹ It may appear at first glance that *Nixon* merely reinforces of the status quo and thus not notable. The decision in fact is significant because it illustrates the Court's strong dissatisfaction with the current state of campaign finance regulation and its willingness to reform these laws in the future.²⁶² Two-thirds of the Justices participated in separate opinions stating either explicitly or implicitly their support for a reconsideration of *Buckley*.²⁶³ Current campaign finance regulations fail to halt corruption within the electoral process and the growth of cynicism among voters.²⁶⁴ Congress has shown itself to be unable to pass reform legislation.²⁶⁵ Current regulations are failing.²⁶⁶ In *Nixon*, the Justices offer varied and opposing solutions to the matter at hand.²⁶⁷ This Note now argues that Justice Kennedy proposes the bold and definitive action necessary to break the current impasse over campaign finance regulations.

260. See *supra* Part II.A and accompanying notes (examining corruption within the political system and voter skepticism).

261. See *supra* notes 157-61 and accompanying text (reciting the scandals emanating from the 1996 Clinton presidential re-election campaign).

262. See *supra* Part II.B and accompanying notes (considering the varied opinions presented in *Nixon*).

263. See *supra* notes 205, 227, 233 and accompanying text (examining suggestions by concurring and dissenting justices that *Buckley* be reconsidered).

264. See *supra* Part II.A and accompanying notes (considering examples of corrupt financing practices and distrust among American voters).

265. See *supra* note 177 and accompanying text (examining the failure of the McCain-Feingold bill to pass in the Senate).

266. See *supra* Part II.A and accompanying text.

267. See *supra* Part II.B and accompanying text (reciting the various opinions of the *Nixon* justices).

The majority refused to accept that its decision possessed broader implications beyond the issues and litigants in *Nixon*.²⁶⁸ The Court maintained that its role was limited to considering the case before it and arriving at a conclusion based on precedent.²⁶⁹ The majority examined whether the Missouri statute represented a constitutionally permissible means of curtailing the influence of money in elections, but did not consider whether the statute was effective in achieving its goals.²⁷⁰ The majority also did not examine whether the FECA provisions as modified by the Court actually prevent corruption or the public's perception of corruption within the electoral process.²⁷¹ Aware of the intractable public debate ensuing over campaign finance practices, the majority chose not to address the broader dispute.²⁷² As the highest court in America²⁷³ and the implicit creator of current regulations,²⁷⁴ the Court should have, in Justice Kennedy's words, "face[d] up to [the] adverse, unintended consequences flowing from [the Court's] prior decisions."²⁷⁵

Although Justice Breyer likewise did not directly examine the effectiveness of contribution limitations, he did consider the broader implications of these restrictions on the political system as a whole.²⁷⁶ Breyer argued that there are legitimate

268. See *supra* notes 202-05 and accompanying text (presenting the majority's view that its role was limited to deciding only those issues pertaining to the *Nixon* litigation).

269. See *id.* (considering the majority's refusal to expand its review to factors beyond those in *Nixon*).

270. See *supra* note 196 and accompanying text (examining the majority's consideration of the Missouri statute's constitutional validity). Although the Court found the statutory limitations did not prevent candidates from running effective campaigns, and noted that voters generally supported such limitations, it never examined the effectiveness of contribution limitations either within Missouri or throughout the United States, in preventing corruption or the appearance thereof. See *Nixon*, 528 U.S. at 382, 396.

271. See Part II.B.1 and accompanying notes (considering the majority's examination of *Nixon* and noting its omission of relevant factors).

272. See *supra* note 205 and accompanying text (noting the majority's choice to narrow the scope of its consideration in *Nixon*).

273. U.S. CONST. art. III, § 1 (establishing the Supreme Court as the highest court in America).

274. See *supra* note 238 and accompanying text (reciting Justice Kennedy's contention that the Court had created the unworkable system through its holding in *Buckley*).

275. See *Nixon*, 528 U.S. at 406 (Kennedy, J., dissenting).

276. See *id.* at 399-405 (Breyer, J., concurring) (considering the larger

constitutional interests on both sides of the issue and it is the Court's role to strike a balance between them.²⁷⁷ Justice Breyer upheld the contribution limitations because he considered them beneficial to the electoral process by democratizing the influence of money within the system and encouraging voter trust and participation.²⁷⁸ He also asserted that the Court should defer to legislative judgments regarding the need for and scope of contribution limitations,²⁷⁹ and should restrict its consideration to the relative burdens imposed on the various participants.²⁸⁰ Justice Breyer stated specifically that the Court should "defer to [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process."²⁸¹ Such decisions, he contended, are better made by elected officials.²⁸² Despite these assertions of support for the majority's decision, Justice Breyer concluded his opinion by questioning the effectiveness of the Court's prior decisions regarding campaign finance regulation²⁸³ and stating his willingness to reconsider

political implications of statutory limitations on contributions).

277. See *id.* at 401 (Breyer, J., concurring) (acknowledging the state's interest in protecting the integrity of the electoral process and the First Amendment interest in free speech through political contributions). Justice Breyer agreed with Justice Stevens' contention that money is not speech, but maintained that it is entitled to First Amendment protection because it enables speech. See *id.* at 400 (Breyer, J., concurring).

278. See *id.* at 401 (Breyer, J., concurring) (asserting that limitations have the potential of protecting the integrity of the electoral process). Justice Breyer supported an interest that was specifically struck down in *Buckley*, namely the restriction of "speech [by] some elements of our society in order to enhance the relative voice of others." *Id.* at 402 (Breyer, J., concurring) (quoting *Buckley*, 424 U.S. at 48-49). The Court, in *Buckley*, firmly rejected this interest as "wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 49. Justice Breyer contended that the government routinely employs this practice, citing as examples the rules of congressional debate and ballot restrictions. See *Nixon*, 528 U.S. at 402 (Breyer, J., concurring).

279. See *Nixon*, 528 U.S. at 402 (Breyer, J., concurring) (asserting his opinion that the Court should employ judicial restraint "[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation").

280. See *id.* (Breyer, J., concurring) (clarifying that although the Court must defer to legislative judgments regarding the need for restrictions, it should still examine and evaluate statutes to guarantee their constitutional validity).

281. *Id.* at 403-04 (Breyer, J., concurring).

282. See *id.* at 403 (Breyer, J., concurring) (concluding that the legislature has a better understanding of the menacing effects of large contributions on the electoral system than does the Court).

283. See *id.* at 404-05 (Breyer, J., concurring). In questioning the usefulness of the Court's decisions Justice Breyer considers two points: (1) that the

Buckley in the future.²⁸⁴

Although Justice Breyer considered the larger issues implicated by the Court's decision in *Nixon*, his reliance on the legislature to cure the ills of campaign finance regulation is flawed.²⁸⁵ It is unrealistic to presume the legislature possesses the fortitude to enact tough and probably unpopular campaign finance regulations, considering the nature of politics and recent congressional financing indiscretions. Although politicians assert their opposition to big money interests, modern elections require significant amounts of money and candidates are dependent upon large contributors. Consequently, Justice Breyer's undiminished deference to the legislature on such a highly political matter appears imprudent.

Justice Stevens's assertion that contributions implicate property interests rather than rights of free speech is interesting but inconsistent. He considered money to be property, not speech,²⁸⁶ and argued that contributions did not merit the same level of protection as actions that clearly implicate free speech.²⁸⁷ This assertion is successfully rebutted by Justice Breyer's reasoning that although money is not speech, it enables speech, and as thus should be afforded First Amendment protection.²⁸⁸

Justice Stevens is alone in his opinion that contribution limitations do not implicate First Amendment rights,²⁸⁹ and it seems unlikely that his fellow Justices would be swayed by his reasoning. Although Justice Stevens concurred with the majority in upholding the contribution limitations, he adamantly

distinction relied upon between contributions and expenditures is in fact inappropriate and should be overturned and (2) that the Court's efforts in reality are blocking potentially successful reform efforts. *Id.* (Breyer, J., concurring).

284. See *id.* at 405 (Breyer, J., concurring) (agreeing that it may be necessary to reconsider the holding of *Buckley*).

285. See *supra* note 225 and accompanying text (noting Justice Breyer's assertion that the Court should defer to the legislature's judgment regarding campaign finance regulation).

286. See *Nixon*, 528 U.S. at 398-99 (Stevens, J., concurring) (clarifying the proper scrutiny due to contribution limitations).

287. See *id.* (Stevens, J., concurring) (justifying the varying levels of protection assigned to property and speech rights).

288. See *supra* note 215 and accompanying text (examining Justice Breyer's argument that contributions implicate First Amendment rights).

289. See *supra* Part II and accompanying notes (noting that all of the other Justices agree that the act of contributing does involve First Amendment speech).

rejected the analytical framework employed to do so and one can infer that he would consider a reevaluation of *Buckley* in the future.²⁹⁰

Unlike the majority, Justice Thomas eagerly accepted an opportunity to reevaluate the law set forth in *Buckley*, and willingly considered the larger arguments relating to *Nixon*.²⁹¹ He focused his attention on protecting campaign contributions as First Amendment speech.²⁹² Justice Thomas argued that *Buckley* should be overturned because the Court fails to employ strict scrutiny in its analysis of the Missouri contribution limitations.²⁹³ According to Justice Thomas, some individuals express their political beliefs through contributions to a candidate articulating a desired message.²⁹⁴ Such activity, he maintains, is political speech and should be protected under the First Amendment as ardently as campaign expenditures.²⁹⁵ Thomas argues for the Court to overturn *Buckley* because it does not provide equal protection for expenditures and contributions and Justice Thomas views such limitations as restraints on free speech.²⁹⁶ *Buckley*, he maintains, discounts First Amendment rights²⁹⁷ and enfeebles constitutional protections.²⁹⁸

290. See *Nixon*, 528 U.S. at 399 (Stevens, J., concurring) (holding that “[t]he right to use one’s own money to hire gladiators, or to fund ‘speech by proxy,’ certainly merits significant constitutional protection . . . [but not] the same protection as the right to say what one pleases”).

291. See *supra* notes 245-59 and accompanying text (setting out Justice Thomas’s argument).

292. See *Nixon*, 528 U.S. at 412 (Thomas, J., dissenting) (accusing the majority of abandoning the principle that political speech represents the core of First Amendment rights).

293. See *supra* notes 251-59 and accompanying text (outlining Justice Thomas’s argument that strict scrutiny should be applied in evaluating contribution limitations).

294. See *supra* note 247 (presenting Justice Thomas’s argument that contributions represent political speech).

295. See *supra* note 246 (examining Justice Thomas’s contention that contributions and expenditures should be treated equally).

296. See *supra* note 245 (calling for *Buckley* to be overturned).

297. See *Nixon*, 528 U.S. at 412 (Thomas, J., dissenting) (maintaining that the majority’s refusal to apply strict scrutiny to campaign contributions is attributable to “*Buckley*’s discounting of the First Amendment interests at stake”).

298. See *id.* at 410 (Thomas, J., dissenting) (admonishing the majority for weakening the “already enfeebled constitutional protection that *Buckley* afforded campaign contributions”).

Justice Thomas offered a strong argument for overturning *Buckley* and contribution limitations based solely on constitutional considerations.²⁹⁹ Justice Kennedy made an equally compelling argument based primarily on practical considerations.³⁰⁰ Justice Kennedy professed three arguments in support of his conclusion that *Buckley* and its imposed amendments to FECA should be overturned.³⁰¹ He first argued that the unintended consequences of the Court's past decisions are far more threatening to the integrity of the electoral system than are large contributions.³⁰² A primary unintended consequence is the issue advocacy advertisement paid for by unregulated soft money.³⁰³ Justice Kennedy argues such advertisements conceal the speaker's true intent and subsequently mocks the First Amendment.³⁰⁴ Contribution limitations, he argued, do little to promote the public's trust in the electoral process and instead cause participants to subvert their true intentions.³⁰⁵ Growing cynicism and disillusionment among voters lends support to Justice Kennedy's conclusion

299. See *id.* at 430 (Thomas, J., dissenting) (maintaining that *Buckley* should be overruled because it diminishes First Amendment rights).

300. See *id.* at 408 (Kennedy, J., dissenting) (calling for *Buckley* to be overturned because the system it created is more harmful to the political process than the corruption it sought to eliminate).

301. See *infra* notes 302, 307, 314 and accompanying text (presenting Justice Kennedy's arguments for overturning *Buckley*).

302. See *Nixon*, 528 U.S. at 406-07 (Kennedy, J., dissenting) (acknowledging that the current campaign financing practices camouflage the speaker's true purpose and create questions regarding accountability).

303. See *id.* (Kennedy, J., dissenting) (finding issue advocacy advertisements to be covert speech).

304. See *id.* at 406-07 (Kennedy, J., dissenting) (arguing the irrationality of a system where "[i]ssue advocacy, like soft money, is unrestricted while straightforward speech in the form of financial contributions paid to a candidate, speech subject to full disclosure and prompt evaluation by the public, is not") (citation omitted).

305. *Id.* (Kennedy, J., dissenting) (describing how candidates and other political participants disguise their true intentions to avoid contribution limitations). Political campaigns increasingly rely on "soft money" issue advocacy to covertly advertise support for a candidate. See *id.* (Kennedy, J., dissenting). Contributions of soft money funds to political parties, purportedly used for party building activities such as "get out the vote" efforts, are not subject to limitations. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 668 (1997). Soft money contributions have increased substantially within the past decade rising from \$89 million in 1992 to \$250 in 1996. See *id.*

that *Buckley* hinders, rather than helps, the electoral process.³⁰⁶

Justice Kennedy's second argument asserted that the entire system of campaign finance is broken and the legislature is incapable of fixing it.³⁰⁷ Politicians, he maintained, face an inherent dilemma, "how to exercise their best judgment while soliciting the continued support and loyalty of constituents whose interests may not always coincide with that judgment."³⁰⁸ Justice Kennedy argued that it is unrealistic to expect a legislature comprised of individuals who must rely on campaign contributions to be elected to exercise the unbiased judgment needed in this matter.³⁰⁹ Thus far Congress has been unable to successfully reform campaign finance regulations.³¹⁰ Many Congressmen are concerned about the amount of time that is spent on fundraising activities.³¹¹ Despite these concerns, Congressmen are equally apprehensive about the effects of campaign finance reforms on their ability to raise the necessary funds for campaigning.³¹² Justice Kennedy correctly concludes that the legislature "cannot oppose this system [*Buckley*] in an effective way without selling out to it first, soft money must be raised to attack the problem of soft money."³¹³

306. See *supra* notes 168-70 and accompanying text (examining the public's increasing alienation from the political process).

307. See *Nixon*, 528 U.S. at 408-09 (Kennedy, J., dissenting) (concluding politicians may find it impossible to pursue valid campaign finance reform while still pleasing contributors).

308. *Id.* at 409 (Kennedy, J., dissenting) (examining political considerations that make it difficult for the legislature to reform campaign finance regulations).

309. See *id.* (Kennedy, J., dissenting) (recognizing the ongoing tension between a politician's need for impartiality and his indebtedness to the contributors). Justice Kennedy asserted that "[w]hether our officeholders can discharge their duties in a proper way when they are beholden to certain interests both for reelection and for campaign support is, I should think, of constant concern not alone to citizens but to conscientious officeholders themselves." *Id.*

310. See *supra* note 179 and accompanying text (noting the failure of the McCain-Feingold campaign finance reform bill).

311. See Robert D. Novak, *McCain's No-Win Win*, WASH. POST, Apr. 2, 2001, at A19 (quoting frustrated Senator Christopher Dodd: "you have to raise something like \$10,000 almost daily in order to raise the money to wage an effective defense of your seat").

312. See Lancaster, *supra* note 183 (quoting Senator Patty Murry's concerns regarding the impact of campaign finance reform on her ability to raise funds, "[o]f course everyone looks at this and says what will it do to me personally, it's obviously a part of our lives").

313. See *Nixon*, 528 U.S. at 407 (Kennedy, J., dissenting) (recognizing a legislator's reliance on campaign contributions to be elected).

This dilemma leads to Justice Kennedy's final argument that the Court must act to resolve the problems of campaign finance regulation.³¹⁴ He concludes that the current state of campaign finance regulation should be attributed to missteps taken by the Court and that it is time for *the Court* to face up to the "unintended consequences" of its prior decisions.³¹⁵ *Buckley* and the subsequent structure of FECA are creatures of the Court.³¹⁶ The legislature originally envisioned a system that limited both contributions and expenditures.³¹⁷ The Court destroyed this original structure, and with it Congress's intent, and replaced its own inherently flawed system of regulation.

Unlike his fellow justices, Justice Kennedy examined not only the constitutional validity of the statutory limitations but also their practical application and effectiveness.³¹⁸ In doing so he concluded that *Buckley* does not work and should be overturned.³¹⁹ Justice Kennedy pointedly stated that the current system of restrictions are failing their purpose because "[t]he very disaffection or distrust that the Court cites as the justification for limits on direct contributions has now spread to the entire political discourse."³²⁰ Because political considerations leave the legislature incapable of comprehensive reform³²¹ and corruption and voter discontent are increasing,³²²

314. See *id.* at 409 (Kennedy, J., dissenting) (arguing that the legislature is unable to rectify the situation and it is, thus, the Court's responsibility to move forward with campaign finance reform).

315. *Id.* at 405 (Kennedy, J., dissenting) (arguing that the majority is incorrectly applying precedent). Justice Kennedy declared that *stare decisis* should only be employed when the Court is willing to correct past mistakes, which Justice Kennedy maintained, the Court is unwilling to do. See *id.*

316. See *id.* at 407 (Kennedy, J., dissenting) (attributing "the unhappy origins" of the current system to the Court's prior campaign finance decisions).

317. See *supra* note 85 and accompanying text (describing FECA as enacted by Congress, which included limitations on both contributions and expenditures).

318. See *Nixon*, 528 U.S. at 407 (noting the unfairness of the current system, which imposes relatively low limitations on regulated contributions while funds such as soft money go unregulated). Justice Kennedy conceded the inequality that exists in a campaign where one candidate enjoys the support of soft money while the other does not. See *id.*

319. *Id.* at 408 (Kennedy, J., dissenting) (concluding a statute intended to stop and to prevent corruption should be overturned when "a worse evil surfaces in the law's actual operation").

320. *Id.* (Kennedy, J., dissenting).

321. See *id.* at 407 (Kennedy, J., dissenting) (considering the practical effects of politics within the issue of campaign finance reform). Justice Kennedy

Justice Kennedy concluded by arguing that it is the Court's responsibility to reform the impractical, ineffective system it created.³²³

The legislature's inability or unwillingness to correct the inherent problems of campaign finance regulations lends support to Justice Kennedy's conclusion that the Court must fix the problems created by *Buckley*.³²⁴ The Court has concluded that a state's interest in preventing corruption or the appearance of corruption within the electoral process is the only interest found compelling enough to justify the infringement of constitutional rights.³²⁵ Current FECA regulations are failing in that task,³²⁶ and the time is right for the Court to reconsider and overturn *Buckley*. The Court has an opportunity to alter dramatically campaign finance regulations. It is evident from *Nixon* that most members of the Court are unhappy with the current state of the law.³²⁷ It is equally evident that candidates and campaigns are still employing corrupt financing practices³²⁸ and that the public is losing faith in the system.³²⁹ Current campaign finance regulations are broken and Congress cannot or will not fix it. It is probable that the Court will consider campaign finance regulation again³³⁰ since many on the Court

concluded that "[b]y operation of the *Buckley* rule, a candidate cannot oppose this system in an effective way without selling out to it first. Soft money must be raised to attack the problem of soft money." *Id.*

322. See Part II.A and accompanying notes (examining corruption within the electoral process and disillusionment among voters).

323. *Nixon*, 528 U.S. at 406-07 (Kennedy, J., dissenting) (attributing the current system of campaign financing to the Court's prior decisions and placing upon it the burden of reform). Justice Kennedy observed that "[t]he current system would be unfortunate, and suspect under the First Amendment, had it evolved from a deliberate legislative choice; but its unhappy origins are in our earlier decree in *Buckley*, which . . . created a misshapen system, one which distorts the meaning of speech." *Id.*

324. See *supra* notes 173-78 and accompanying text (discussing Congress's inability to enact substantive reform).

325. See *supra* note 254.

326. See Part II.A (disclosing numerous examples of corrupt practices by politicians and examining the public's perception of corruption within the electoral process and politics in general).

327. See Part II.B and accompanying notes (discussing the various opinions expressed in *Nixon*).

328. See Part II.B and accompanying notes (examining political corruption in the House of Representatives, the Senate, and the Presidency).

329. See Part I.B and accompanying notes (considering apathy among voters and the public's general distrust of politics and politicians).

330. The Court examined FECA regulations once again when it heard oral

previously voiced their willingness to reconsider *Buckley*.³³¹ The *Nixon* decision provides an excellent source to predict the positions to be taken by the individual justices.

IV. CONCLUSION

The significance of *Nixon* is not that it upheld *Buckley*, but that it upheld *Buckley* when the majority of the Justices were dissatisfied with either the analysis used in that case or the unintended consequences that emerged since that decision. Although the limitations established in *Buckley* were upheld by a six-to-three majority, five of the Justices would consider overruling *Buckley*. FECA limitations are clearly not fulfilling their intended purpose. Corruption within the electoral process appears alive and well, and voter cynicism is rising nearly proportionally to skyrocketing campaign costs and politicians' efforts to gather yet more money. Thus far the legislature is unable or unwilling to enact the comprehensive reform so desperately needed.

Nixon is a clear indicator of the various positions taken by the Justices on this complex and pressing problem. Justice Kennedy's opinion provides a realistic evaluation of the current situation and is correct in suggesting that the Court should reconsider *Buckley*. The unintended consequences of that earlier decision have proven worse than the corruption it sought to contain. Political interests have robbed the legislature of its ability to offer the bold, and perhaps unpopular, reforms necessary to break the impasse on this issue. It is time for the Court to reconsider *Buckley* and the unworkable system of campaign finance it partially created.

arguments in *FEC v. Colorado Republican Federal Campaign Committee* this term. See 69 USLW 3249, 69 USLW 3257. This case was originally considered by the Court in 1996. See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996). The Court held that limitations imposed on party expenditures made in coordination with candidates or their campaigns were valid. See *id.* at 624-25. After its decision, the case was remanded to a district court for consideration of whether the party's First Amendment right to free speech was violated by the expenditure limitation. See Linda Greenhouse, *High Court Takes Colorado Campaign Finance Dispute*, DEN. POST, Oct. 11, 2000, at A2. The district court and the Tenth Circuit Court of Appeals both held limitations on party expenditures made in coordination with candidates violated free speech rights. See Joan Biskupic, *Justices to Review Political Spending Limit*, USA TODAY, Oct. 11, 2000, at A1. As of publication, the Supreme Court has not issued an opinion in this case.

331. See *supra* note 226.

Twenty-four years after *Buckley*, the process is far from improved and, in fact, is worsening. *Nixon* clearly illustrates the Court's discontent with the present state of the law and indicates the likelihood that it will thoroughly reexamine the *Buckley* standard soon.

